114-668

VOL. 2.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. 347. 42

CALVIN AMORY STEVENS, EUGENE KELLY, JOHN T. TERRY AND PETER GEDDES,

vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

purpose. The only accounts shown on the books of the Merchants' Bank for said years with the Bank of Tennessee were two: first, the general reciprocal account, on one side of which appeared the gross sums of money to the credit of the Bank of Tennessee, and on the other, its checks and drafts; secondly, an interest or coupon account showing the amount of coupons paid, and this account was credited with, and balanced by, checks drawn by the Bank of Tennessee upon its regular account and balance in the Merchants' Bank at the time, without discrimination as to the coupons to which the payments were applied.

This admission is made alone to save the expense and trouble of making copies of the entries from said books of the Merchants' Bank, and states truly the facts as they actually appear on the books of said Merchants' Bank.

E. L. ANDREWS,
Solicitor for Complainants.

W. Y. C. HUMES,
Solicitor for Defendants.

FEBRUARY 14, 1880.

Stipulation.

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF TENNESSEE.

CALVIN AMORY STEVENS *et al.*, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the East Tennessee and Virginia Railroad Company,

vs.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

CALVIN AMORY STEVENS *et al.*, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the East Tennessee and Georgia Railroad Company,

vs.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

5 CALVIN AMORY STEVENS *et al.*, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the Cincinnati and Cumberland Gap and Charleston Railroad Company,

vs.

6 THE CINCINNATI, CUMBERLAND GAP AND CHARLESTON RAILROAD COMPANY *et al.*

CALVIN AMORY STEVENS *et al.*, on behalf of the holders of Internal Improvement Bonds of Tennessee,
7 issued to the Knoxville and Railroad Company.

vs.

THE KNOXVILLE AND RAILROAD COMPANY *et al.*

8

WESTERN DISTRICT OF TENNESSEE.

CALVIN AMORY STEVENS *et al.*, on behalf of the holders of Internal Improvement Bonds of Tennessee, issued to the Memphis and Charleston Railroad Company

vs.

THE MEMPHIS & CHARLESTON RAILROAD COMPANY *et al.*

It is hereby stipulated by and between the parties to the above-entitled suits, in order to avoid the trouble, expense and delay of formal proof, that the following facts are to be taken as proven in these causes:

First.—That up to the passage of the Internal Improvement law, February 11, 1852, the State of Tennessee had never defaulted upon the interest of her public debt, and the straight bonds of the State were, before such date, and thereafter, quoted on New York stock exchange as follows:

13 Quotations of sales of Tennessee State bonds taken from the official reports of the New York Stock Exchange—

DATE OF SALE.			AMOUNT OF SALE.	PRICE.
1850	April	23	1,000 6s	105
"	May	29	1,000 6s	104
"	July	15	1,000 6s	104
14 "	Nov.	4	2,000 6s	101¼
1851	March	27	5,000 6s	100½
"	April	3	10,000 6s	100½
"	May	17	2,000 6s	100½
1852	Feb'y	24	1,000 6s	102
"	April	9	7,000 6s,'90	105
"	May	31	2,000 5s	92
"	June	17	2,000 6s	110
"	July	19	2,000 5s	92
"	Dec.	9	5,000 6s,'68	106
1853	June		3,000 6s,'90	108
"	July		7,000 6s	105⅝

15

Second.—That with the exception of some interest paid in 1867 and 1868, and some paid in 1874 and 1875, the State of Tennessee has paid no interest upon any of its obligations since the commencement of the late war, and the coupons of the bonds of these complainants, up to the first day of January, 1876, and since the beginning of the war, except that paid by the State in 1867-8, and in 1874-5,
16 as previously stated, has nearly all been funded into new bonds of the State of Tennessee under the various funding Acts of said State.

Third.—That the prices of Tennessee State bonds at the New York Stock Exchange in each month from April, 1870, to December, 1875, and during the first six months of 1879, were as follows:

1870.

	New.	Ex. comp.	Old.	Highest price	Lowest price	Average price
April	2193			57¼	51	542.68873
		299		61	58	579.47388
May	2415			57¼	54⅝	560.26577
		260		70	59¼	614.53365
June	5865			65⅛	57¼	602.13162
		783		67¼	61¼	630.47254
July	3621			68¼	58¼	634.78317
		643		70	61	648.29182
August	860			67⅛	59½	587.42185
		312		64	60	616.40147
September		196		63¼	61¼	622.21358
	633			62	60	606.21298
October	331			62	60	604.68777
			1	62½	62½	625.00
		142		62½	62½	626.77774
November	529			62½	55¼	580.19864
			150	62	57	604.25
December	1370			64¼	57¼	614.08340
			326	63	60	620.12142

1871.

	New.	Old.	Highest price.	Lowest price.	Average price.
January	1059		64¼	61	634.48750
		542	64¼	62½	636.73488
February	360		64¼	62½	634.57500
		305	64¼	62	640.40683
March	555		65¼	63¼	646.72072
		325	65¼	63¼	644.58769
April	562		67¼	63¼	664.16727
		456	67¼	65¼	666.69034
May	1365		72½	67¼	715.11454
		761	72½	67¼	713.21287
June	472		75	70¼	735.19874
		340	73½	71	726.26173
July	158		73½	72½	730.81394
		170	73¾	72½	734.81545
August	372		76½	73	750.09998
		294	76	73	748.82762
September	232		75	72½	739.56597
		240	74½	72	736.67408
October		357	72	64¾	680.12788
	709		73¾	63½	672.80269
November		272	68	64	663.47778
	467		68½	64	664.30348
December		330	67¼	62	638.12262
	509		67	61¼	639.28794

1872.

	Old.	New.	Highest price.	Lowest price.	Average price.
January	212		68	63½	652.77122
		373	67¾	63½	655.67962
February	216		67¾	65½	668.28472
		607	67⅞	65½	662.54736
March	88		67	66	666.78840
		184	67⅛	66	667.88043
April	268		70½	66¾	677.66790
		104	70¾	66¾	687.07932
May	421		73½	68¼	718.23337
		460	73½	68¼	714.25
June	298		75	72	737.26929
		149	75	72	731.27576
July	176		75	72½	733.79261
		232	75⅛	72¾	723.16271
August	155		74½	73¼	737.91934
		320	75	73¼	737.77734
September	143		74	72	728.07692
		140	74⅜	71	728.08928
October	223		75⅛	72½	732.99887
		203	75½	72½	731.60714
November	226		76	73	739.05073
		132	76¼	73½	747.23484
December	233		82½	76	794.71801
		178	83	76	811.59410

1873.

	Old.	New.	Highest price	Lowest price	Average Price.
January	226		82¼	79¼	806.58834
		244	82½	79¾	807.80737
February	217		83½	79	805.36784
		735	83½	78½	798.79591
March	768		86	80	820.55826
		1066	87	79½	819.00689
April	204		80¾	77½	797.67769
		145	80¾	78½	792.83487
May	145		82	79	812.09482
		240	82	78½	810.03645
June	51		81	79	797.30392
		187	80½	78½	792.26604
July	74		81¾	80¼	809.40878
		174	81½	79¾	810.
August		101	82⅛	81⅛	820.27227
	30		82½	81¾	822.
September	23		82⅛	72	798.48484
		100	82¼	72½	805.77500
October	194		75	68	707.20360
		128	74¾	69	716.72851
November	48		72¾	62	665.93750
		141	72½	62	698.74113
December	70		81¾	73	782.03571
		110	81	71¾	780.52272

January													
February													
March													
April													
May													
June													
July													
August													
September													
October													
November													
December													

		1875.	Old.	New Series.	Old Es. Coupon.	New Es. Coupon.	New.	Coup. Es.	Highest Price.	Lowest Price.	Average Price.
		January.....		71					55¾	44	499.85915
					137				50⅝	43	513.43075
						193			56	47	521.26295
							2		78¾	78¾	787.50
		February.....						15	55½	55½	555.
						34			49½	45	472.64705
	30				60				50	46	482.58333
				30					48	45	456.70833
			1						67½	67½	675.
		March					1		65	65	650.
						54			48¼	47	477.17592
					86				49	47¼	479.89825
				84					48	46	474.22619
		April					1		70	70	700.
						69			53⅞	49	529.74657
					115				55	49¾	537.16304
				46					53½	50	517.77173
		May.....					34		71½	50	507.64705
			68						51¼	50¼	509.06250
						24			51	49½	501.66666
					44				51¾	50	507.55681
				97					51	49½	502.83814
	31	June.....					34		54⅞	45¼	513.12500
			223						55	46	505.19618
				94					54⅜	45	486.50574
		July	190						51¼	47½	500.34868
				22					50	47½	487.72727
							85		50⅞	47½	494.41176
		August.....					72		53	49⅜	510.31250
			113						53½	50¼	518.86061
				35					52½	50	504.85714
						11			51	50	505.11363
		September.....	12						52	51½	517.29166
				18					51	50	508.05555
		October.....					49		50	46	470.25510
				47					47⅜	45½	463.24468
			107						48½	52½	501.93925
	32	November.....		71					46¾	45	463.75
			180						49	46	471.00694
							62		47	45	458.48790
		December.....	126						47	40¾	431.18055
							129		45	38¼	422.82945
				91					45	38¾	409.07907

January						
February						
March						
April						
May						
June						
July						

The foregoing stipulation is made subject to all legal objections to the materiality and relevancy of the matters therein stated.

EVARTS, SOUTHMAYD & CHOATE.
E. L. ANDREWS.

CIRCUIT COURT OF THE UNITED STATES.

SIXTH JUDICIAL CIRCUIT, WESTERN DISTRICT OF TENNESSEE.

Calvin Amory Stevens, who sues on behalf of himself and other holders of Tennessee State Bonds, issued to the Memphis and Charleston Railroad Company

against

The Memphis and Charleston Railroad Company, and the East Tennessee, Virginia and Georgia Railroad Company.

Same Complainant, on behalf of himself and other holders of Tennessee State Bonds, issued to the East Tennessee and Georgia Railroad Company.

against

The East Tennessee and Georgia Railroad Company.

Same Complainant, on behalf of himself and other holders of Tennessee State Bonds, issued to the East Tennessee and Georgia Railroad Company.

against

The East Tennessee, Virginia and Georgia Railroad Company.

Same Complainant, on behalf of himself and other holders of Tennessee State Bonds, issued to the Knoxville and Kentucky Railroad Company.

against

The Knoxville and Kentucky Railroad Company, and the Knoxville and Ohio Railroad Company.

It is stipulated between the complainant and the

defendants, William T. Walters, on behalf of himself and other holders of bonds of the Memphis and Charleston Railroad Company, and as defendant as trustee of the mortgage of the Knoxville and Ohio Railroad Company, and Charles Burckhardt and others, on behalf of themselves and other holders of bonds of the East Tennessee, Virginia and Georgia Railroad Company, that the following facts are admitted in the above entitled causes, without proof:

First.—That on the 20th of August, 1877, the Memphis and Charleston Railroad Company, a corporation duly created and organized under the laws of the States of Tennessee, Alabama and Mississippi, party of the first part, and the Farmers' Loan and Trust Company, a corporation created by the laws of the State of New York, party of the second part, entered into a certain indenture, or deed of trust, which was duly executed and delivered by the Memphis and Charleston Railroad Company, and registered according to the laws of Tennessee, Alabama and Mississippi, a true copy which is attached to the answer of the said William T. Walters, in the case against said company and others, marked "Exhibit No. 1;" that in pursuance of the provisions of said indenture, the Memphis and Charleston Railroad Company and the Farmers' Loan and Trust Company, on the 21st day of August, 1877, entered into another and further agreement and indenture, known as a tripartite agreement, with Adrian Iselin and Adrian Iselin, Junior, composing the firm of A. Iselin & Co., of the State of New York, parties of the first part thereto, a true copy of which is also attached to said answer, marked "Exhibit No. 2;" that the bonds described and secured by said mortgage, or deed of trust, were duly issued and used for the purposes therein described and authorized, and were sold to purchas-

ers in good faith and for full value, but below their par value; that the certificate of Marshall T. Polk, Treasurer of the State of Tennessee, and of James D. Porter, Governor, and Charles N. Gibbs, Secretary of State, of said State, correct copies of which are set out in said tripartite agreement, being Exhibit No. 2 to said answer, were made as therein alleged; that the said Adrian Iselin and Adrian Iselin, Junior, composing the firm of A. Iselin & Co., did, as therein recited, with the consent and approbation of the Memphis & Charleston Railroad Company, and of its board of directors, pay to the State of Tennessee, in the bonds of said State and coupons of such bonds, at par, which bonds and coupons had been purchased at less than par, the amount of indebtedness of the Memphis & Charleston Railroad Company, claimed by the State to be due to it, and for which it claimed a lien on said railroad, for bonds of the State of Tennessee loaned by it to said railroad company under the internal improvement laws, and for certain other State bonds issued to fund or provide for interest on the amount thereof, during a certain period; that the said William T. Walters is the owner and holder of eighty of said bonds of the Memphis & Charleston Railroad Company for one thousand dollars each, with the coupons thereto attached, referred to in said two deeds, which are a part of the first fourteen hundred thereof, in number being numbered from 1,241 to 1,320, inclusive, the said Walters having purchased the same in good faith and for full value, after the execution of said two deeds; that the said Walters requested the Farmers' Loan and Trust Company, as trustee under said tripartite agreement for his benefit and that of other holders of said bonds, numbered from one to fourteen hundred, and as such claiming to hold the legal interest and title for that purpose of a lien claimed in this case by the com-

plainant for his own use and benefit to cause itself to be made a party defendant in this suit, and defend the same for the interest of the said holders and others similarly situated, which the said Farmers' Loan and Trust Company declined and refused to do.

Second.—That on or about the first day of June, 1870, the East Tennessee, Virginia and Georgia Railroad Company, a corporation organized under the laws of the States of Tennessee and Georgia, party of the first part, and Philo C. Calhoun, Richard T. Wilson, and Adrian Iselin, all citizens of the State of New York, parties of the second part, entered into a certain indenture or deed of trust or mortgage of that date, duly executed and delivered by the said parties, acknowledged and registered according to the laws of the States of Tennessee and Georgia, a true copy of which is attached to the answer of the said Charles Burckhardt and others herein, and marked "Exhibit No. 2;" that on the 11th day of August, 1870, the East Tennessee, Virginia & Georgia Railroad Company made a settlement with the State of Tennessee, for the indebtedness of the said company, claimed to be due to the said State, on account of bonds of said State, loaned and advanced by it to the East Tennessee and Virginia Railroad Company, and the East Tennessee and Georgia Railroad Company, by the payment to said State on that day of the sum of $4,117,761.10 in bonds of the State of Tennessee, and past due coupons thereon, at par, being the entire amount of the indebtedness of the said railroad companies claimed to be due to said State on that account, as of the 1st day of July, 1870, a statement of which debt, and the settlement thereof, certified by Edward W. Pennabacker, Comp-

troller of said State, a true copy of which is set out in "Schedule A," to the answer of the East Tennessee, Virginia and Georgia Railroad Company, to the bill of complaint of the complainant herein; that the whole amount of bonds described in said indenture or deed of trust and mortgage made by the said East Tennessee, Virginia and Georgia Railroad Company to the said Calhoun Wilson and Iselin, as aforesaid, after the date of said settlement of August 11, 1870, were issued and sold and disposed of by the said East Tennessee, Virginia and Georgia Railroad Company, for the uses and purposes therein mentioned, and were negotiated and sold in the city of New York and in Europe, but mostly in Europe, to *bona fide* purchasers, for full value, but less than par, and the proceeds thereof were used to replace moneys borrowed for and used in the purchase of the bonds of the State of Tennessee, delivered to said State in settlement of the said claim of indebtedness of said East Tennessee and Virginia Railroad Company, and the East Tennessee and Georgia Railroad Company, which bonds and coupons of the State of Tennessee, so purchased and used, were bought in open public market, in the city of New York, at the prevailing market rates, but below their par value, and were delivered to and accepted by the State of Tennessee, through its comptroller, in satisfaction of said debt claimed to be due to the State from the said companies as aforesaid, on account of internal improvement bonds of said State originally loaned and advanced to the said East Tennessee and Virginia, and the East Tennessee and Georgia Railroad Companies; that the said Charles Burckhardt, Henry Saladin, Charles Diggelman, Victor Fauche and Caroline Tschraur, purchased and still hold of said bonds the sums named in their said answer respectively, and that the said respondents whose

names are in the list marked "Exhibit No. 1," attached to said answer, each purchased and still holds of said bonds the several amounts set opposite their respective names in said list, and that they were and are *bona fide* purchasers and holders of said bonds, having bought the same in good faith and for full value, but below par. That the said Burckhardt and others requested the said Calhoun, Wilson and Iselin, trustees, as aforesaid, under the said mortgage, to take the necessary steps to protect the interest against the claim of the complainant and other holders of Tennessee State bonds, by making themselves defendants in this case, which the said Calhoun, Wilson and Iselin declined to do.

Third.—That the Knoxville and Ohio Railroad Company, a corporation duly created and organized under the laws of the State of Tennessee, has acquired the legal and beneficial title and possession of the Knoxville and Kentucky Railroad, and of all the property pertaining thereto, formerly belonging to the Knoxville and Kentucky Railroad Company, by virtue of the judicial proceedings set forth in the answer herein, filed by the said the Knoxville and Kentucky Railroad Company, and of the Knoxville and Ohio Railroad Company, a record of the proceedings of which it is agreed may be read herein; that the Knoxville and Ohio Railroad Company having thus acquired title to the said property, did, on the 1st day of January, 1876, enter into a certain indenture or deed of trust and mortgage, as party thereto of the first part, to and with Richard T. Wilson, a citizen of the State of New York, and William T. Walters, a citizen of the State of Maryland, parties of the second part, which was duly executed and delivered, acknowledged and registered, as required by the laws of the State

of Tennessee, a true copy whereof is attached to the answer of the said William T. Walters, herein, marked "Exhibit No. 1;" that the whole amount of bonds mentioned and described in the said deed of trust and mortgage, have been duly issued by the Knoxville and Ohio Railroad Company, and have been sold for full value, but below par, in the public and open market, in the city of New York and elsewhere, to *bona fide* purchasers, and are now outstanding.

Fourthly.—The stipulation of even date herewith signed by George Hoadly, solicitor for complainant, and Stanley Matthews, solicitor for respondents, in the five cases brought in the Middle and Western Districts of Tennessee, against the Louisville and Nashville Railroad Company and the Nashville and Decatur Railroad Company, and others, is hereby made part of this stipulation, as fully as if herein again set forth, and so far as the agreements and recitals thereof are applicable to these cases they are to bind us in these cases.

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE MIDDLE DISTRICT OF TENNESSEE.

Calvin Amory Stevens, who sues for himself and other holders of the Bonds of the State of Tennessee issued to the Louisville and Nashville Railroad Company,

vs.

The Louisville and Nashville Railroad Company and John B. Smith.

Same, upon Bonds issued to the Tennessee and Alabama Railroad Company,

vs.

The Nashville and Decatur Railroad Company, Charles Diggleman, and others.

Same, upon Bonds issued to the Central Southern Railroad Company,

vs.

Same defendants.

IN THE CIRCUIT COURT,

FOR THE WESTERN DISTRICT OF TENNESSEE.

Same upon Bonds issued to the Memphis, Clarksville and Louisville Railroad Company,

vs.

The Louisville and Nashville Railroad Company and John B. Smith.

Same, upon Bonds issued to the Memphis and Ohio Railroad Company,

vs.

Same Defendants.

IN EQUITY.

It is hereby stipulated and agreed by and be-

tween the parties hereto, being parties to the above-entitled suits, in order to avoid the trouble, expense and delay of formal proof, that the following may be taken and held to be proven as facts in each of said causes, so far as applicable thereto, but subject to all proper objections for incompetency or irrelevancy.

1. The stipulation dated August 14, 1879, signed by E. L. Andrews, solicitor for complainants, and Ed. Baxter, solicitor for respondents, is to be taken as part of this agreement as fully as if recited and again set forth herein.

2. Either party shall be at liberty to use any or all of the depositions taken in any or all of the cases now pending in the Circuit Courts of the United States for the Eastern, Middle and Western Districts of Tennessee, brought by the said complainant, or by him and others, to enforce the lien reserved by the internal improvement laws of said State against divers railroad companies, so far as the testimony therein contained may be competent and relevant herein. A list or statement of such depositions shall be furnished by the party using the same to the other at the hearing, and printed copies of such depositions shall be filed in any case in which the same may be used.

3. Either party shall be at liberty to file in any of these causes a copy of the whole or any part of a printed compilation of laws, records and documents made under the complainant's directions, containing 390 printed pages, and either party may read as evidence, without further proof, such parts thereof as they may see fit, subject to all proper objections, on the ground of incompetency or irrelevancy.

4. It is further agreed that the Louisville and Nashville Railroad Company is a body corporate and politic, chartered by the acts of the General

IN THE

CIRCUIT COURT OF THE UNITED STATES,

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IN THE CIRCUIT COURT,

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3. Either party shall be at liberty to file in any of these causes a copy of the whole or any part of a printed compilation of laws, records and documents made under the complainant's directions, containing 390 printed pages, and either party may read as evidence, without further proof, such parts thereof as they may see fit, subject to all proper objections, on the ground of incompetency or irrelevancy.

4. It is further agreed that the Louisville and Nashville Railroad Company is a body corporate and politic, chartered by the acts of the General

Assembly of the Commonwealth of Kentucky. The right of way to construct its railroad from the line between the States of Kentucky and Tennessee to Nashville was granted it by the acts of the General Assembly of Tennessee, but it has never been incorporated by said State, and, therefore, is not a citizen thereof, but of the State of Kentucky; that the object and purpose of the creation of said corporation by the said charter and laws, was the construction, completion, and thereafter the operation and management, among others, of a line of railway for the transportation of passengers and freight, from the city of Louisville, in the State of Kentucky, to the city of Nashville, in the State of Tennessee. For this purpose such powers were granted to said corporation as are declared in the several charters and acts of incorporation of Kentucky, and acts giving it a right of way and to transact business in the State of Tennessee. The said corporation was authorized to borrow money for the purposes of the enterprise. It was likewise authorized to impose liens and execute mortgages upon its property to provide for and insure the payment of its liabilities.

That all bonds of the State of Tennessee loaned to railroad companies under the act of the General Assembly of the State of Tennessee, passed February 11, 1852, and the acts amendatory and supplementary thereto, including those loaned to the Louisville and Nashville Railroad Company, were sold in the market as straight Tennessee State bonds, as distinguished from bonds of railroad companies, indorsed or guaranteed by the State; that what were known in the market by the public as straight Tennessee bonds, the said bonds, including those loaned to the Louisville and Nashville Railroad Company, sold before the war, at the following prices:

While bonds of other descriptions, on which the railroad companies were bound as principals, and the State of Tennessee as surety, were sold at the following prices:

That the Louisville and Nashville Railroad Company received from the State of Tennessee her six per cent. coupon bonds, at the times and in the amounts following, and none others, and at no other dates, namely:

Received April 30, 1858, 50 bonds amounting to $50,000.

Received April 30, 1858, 150 bonds amounting to $150,000.

Received April 30, 1858, 100 bonds amounting to $100,000.

Received July 15, 1859, 150 bonds amounting to $150,000.

Received April 20, 1861, 5 bonds amounting to $5,000.

Said bonds, to the amount of five hundred and sixty thousand five hundred dollars, were received by or on behalf of the Louisville and Nashville Railroad Company, through properly appointed officers, and were by said company negotiated and sold, in pursuance of law, to *bona fide* holders, but none were received prior to April 30, 1858. The proceeds of these bonds were applied as directed by the laws under which they were loaned to said railroad company; that the State of Tennessee has failed to pay to the holders of its bonds and coupons thereon, representing interest accruing thereon, which became due on the first day of July, 1876, and all falling due since that date, and is in default therefor; that, on May 5, 1865, the General Assembly of the State, by joint resolution, appointed the comptroller, secretary of state, attorney-general, and commissioner of public works, a board to make a settlement with the Louisville and Nashville Railroad Company, and if a satisfactory settlement could not be obtained, the governor was authorized to have instituted such legal proceedings as might be necessary to protect the interests of the State. On the 18th of November, 1865, said commissioners reported to the legislature that they had effected a settlement: that the bonds loaned said company by the State amounted to $560,000, and the overdue interest thereon to $147,131.25; that the company had proposed to pay the entire principal in straight six per cent. coupon bonds of the State and the interest in coupon bonds of the State then due. The commissioners say: "Believing it to be manifestly for the interests of the State to call in this large installment of its indebtedness,

and believing moreover, that the company had a right under the law regulating the sinking fund to pay off its entire indebtedness in the bonds of the State, your commissioners accepted the proposal, and executed to the company a receipt dated November 17, 1865, for $707,631.25 in bonds and coupons of the, being the total indebtedness of said company to the, State of Tennessee on account of the bonds of the State received in aid of the construction of said road and the bridge across the Cumberland river." True copies of said resolution and report are annexed to the answer filed by John B. Smith in the first of said cases; that the said railroad company actually delivered said bonds and coupons as in said receipt is recited; that at the time this settlement was made in 1865, the State was in default for non-payment of the interest on its bonds from July, 1861; that the bonds and coupons paid by the Louisville and Nashville Railroad Company to the State of Tennessee in the said settlement, were not the identical bonds and coupons originally advanced and loaned to said company and by it negotiated and sold, but that the same, in part at least, were other bonds and coupons of the State of Tennessee; that, at the time said settlement was made, the war had but recently prior thereto definitely closed. During the period of actual military operations, the railroads had been the the prize of contending armies, as instruments of offense and defense. In the course of the struggle, they had been stripped of their equipment, and parts of them destroyed and repaired, and, in some cases, built and extended, by the United States Government, to fit them for military use, but so that when they were finally restored, on or about August, 1865, to their owners, they were destitute of rolling stock, cars, machinery, shops, and tools, and almost every thing needed for an

equipment, nearly every thing of that description then in actual use upon the roads being the property of the United States, furnished and employed for its military uses This they were permitted to purchase and did so in pursuance of executive orders issued by the President of the United States in September and October of that year, but being unable to pay cash, gave their obligations for the purchase money payable in installments and bearing interest. The roads themselves, their road beds, tracks, trestle-works, bridges, and permanent works of every description, were, to a greater or less extent, out of repair, in need of restoration, in some instances in a state of actual dilapidation. Business of every kind had been largely suspended by the war, except military transportation, and now, that employment ceased with the cessation of hostilities, but the fruits of peace, in the revival of industry and trade, could only come with the lapse of time, and the gradual accommodation of the community to the new order of things. The general result was that the railroads required large sums of money to put them in a condition to earn an income, and, after that, would have to wait the slow operation of general causes upon the social condition of the people, before any revival of trade would renew their sources of revenue. In the meantime, a large arrearage of debt, for unpaid interest, had accumulated by reason of the default, during the whole period from July, 1861, both of the State and the railroad companies, in consequence of which the State securities had become discredited in the markets of the world.

It is, however, admitted that the said facts of depreciation of property and credit are true to a less extent of the main line of the Louisville and Nashville Railroad between Louisville and Nashville, than of the other railroads in Tennessee; that about

the time said settlement was made with the Louisville and Nashville Railroad Company, to wit, on November 8, 1865, the General Assembly of the State of Tennessee, by joint resolution, appointed a joint committee to examine into the condition of the sinking fund; that every holder of bonds of the State of Tennessee originally issued under the internal improvement laws, including the complainant, so far as he then owned said bonds, and his predecessors in ownership of the bonds since acquired by him, accepted the provisions of the act of November 23, 1865, delivering to the State the overdue and unpaid coupons of said bonds, which had matured from July 1, 1861, to January 1, 1866, and receiving in exchange therefor the said State bonds, authorized thereby; that, after the proceedings and legislation of the State of Tennessee, hereinbefore and in the pleadings set out, including said settlement with the Louisville and Nashville Railroad Company of November 17, 1865, and the passage of said act of November 23, 1865, the market price of the bonds of the State of Tennessee, in the city of New York, rose from about fifty cents on the dollar in the month of March in that year to ninety-two cents on the dollar in the month of December in the same year; that many of the railroad companies were unable to provide the means to meet the interest falling due on the 1st of July, 1867, which by law they were bound to provide, and failed to do so, to the extent of nearly $800,000, but that the State nevertheless paid the whole amount of interest falling due on that date on its bonds to the holders thereof; that all the holders of the bonds of the State, including the complainant and his predecessors in the ownership of any he now holds, and those associated and acting with him in the prosecution of this and similar suits, and their predecessors in such ownership,

accepted the provision of these acts and funded their overdue coupons, and received payment of current accruing interest after January 1, 1874 to January 1, 1876, in accordance with the terms of the act of the General Assembly of the State of Tennessee, passed March 17, 1873, and particularly that they registered their bonds in compliance with the provisions of the ninth section of said act; that in the meantime, on the tenth day of November, 1868, the Governor of the State had informed the General Assembly that six railroads in the hands of Receivers were at that time indebted to the State on interest account due July 1, 1868, one million one hundred and twenty thousand nine hundred and ninety-six dollars and eighty-six cents, and stated that he would have seized two other roads for failure to pay the July interest of that year, and placed them in the hands of Receivers, but that he had learned by experience that to do so would only entail increased burdens upon the State Treasury, and expressed the opinion that the interest of these roads as well as that of the State, required that they should be sold, and the proceeds thereof applied to the reduction of the State debt. In the same message, he said:

"Leading gentlemen, connected with important railroads largely indebted to the State are asking for authority to issue second mortgage bonds, with a view of exchanging them for State bonds. Thus purchasing State bonds by the avails of these second mortgage bonds, the debt now due by the State would in like amount be transferred to these rail road companies, and so the State would be relieved of a burden of several million of dollars of debt now resting upon it. I regard this proposition with approval, and advise its adoption by the Assembly. The payment of large debts now due from the roads alluded to, and the sale of the roads already

in the hands of Receivers, would reduce the State liabilities at least one-third."

That at the session of the General Assembly in 1871, the Governor, in his message to that body, stated that under said act of February 25, 1869, as amended by the act of January 20, 1870, ch. 44, over eight million of dollars in the bonds of the State had been retired and canceled; that other roads had purchased and were then purchasing bonds with which to cancel their liabilities to the State under the said acts, and in order to prevent further delay on the part of solvent roads that had not retired their indebtedness to the State under said act, recommended that the act be either repealed to take effect at some future time not remote, or that its provisions be so amended as that the roads be required to pay all accrued interest as well as the sinking fund not theretofore paid in. In the same document the Governor also stated that but three of the delinquent railroads remained unsold, and added: "It will be a gratifying result when the State is entirely divorced from the railroad system. And, although the sales will not realize all that was desired, and leave a large debt to be provided for, yet the internal improvement system of Tennessee had added millions to her wealth and diffused such energy and enterprise into every class of society, that no intelligent man can regret the policy which inaugurated the system, notwithstanding a large amount of appropriations made since the war have been improperly expended."

That the several railroad companies to whom loans of internal improvement bonds had been made and the State of Tennessee dealt together under the said acts of February 25, 1869, and of January 20, 1870, according to the terms thereof (except as to settlements made prior to the passage of said acts), the various railroad companies who were able

to do so, and who were on that account called solvent, purchasing in the open market, at the market price, bonds of the State of Tennessee, without discrimination as to their description, or on what account, or to whom issued, and in order to raise the means so to do, the said railroad companies issued their own bonds, secured by mortgages on their railroad property as a first lien thereon, or in accordance with the said acts of 1869 and 1870, and the same were sold in the markets of this country and of Europe, to purchasers for value, to the amount of many millions of dollars, now outstanding; and that those railroads, known as delinquent railroads, the corporations owning which were not able thus to liquidate their indebtedness to the State, were sold by the authority of the State, by virtue of judicial decrees, rendered in a proceeding instituted and prosecuted by the State under and according to the provisions of the act of December 20, 1870, a printed copy of the record of which either party is at liberty to file in said causes, and to use as evidence so far as relevant and competent; and the purchasers thereof paid for the same, as by said act and decree they were authorized to do, in any bonds of the State.

That by virtue of said dealings and transactions, and in consequence thereof, the result, in regard to the reduction of the public debt reached, was as follows: The total bonded debt of the State, including $13,782,000 of funding bonds issued under the acts of 1866, 1868, and 1873, amounted to $49,173,316.66. Of this, $29,251,250.00 represented the amounts of internal improvement bonds loaned to railroad companies, but not including the unpaid interest thereon, embraced in any series of funding bonds. The amount of $28,163,016.66 have, under the various acts aforesaid, been surrendered and canceled; and of them $16,265,000 were internal

improvement bonds loaned to railroad companies, and $4,326,000 were funding bonds under the acts of 1866 and 1868. The account between the State and the two descriptions of railroads, is as follows:

First.—Defaulting railroads sold:

Bonds issued	$14,628,000.00
Int. funded, 1866	1,122,306.00
Int. unpaid, July, 1870	3,331,163.12
U. S. claims assumed	511,560.00
Total	$19,593,029.12
Amount realized by sale	6,698,000.00
Loss to State	$12,895,029.12

Second.—Roads which have settled their indebtedness:

Bonds issued	$12,742,000.00
Int. funded January, 1866	1,850,768.00
Sinking fund paid	493,306.00
Unaccounted for	1,255,700.00

The particulars of which are truly stated in Exhibit No. 5 to the answer of John B. Smith, in the *fourth* of said cases; that, during the whole period of these transactions, from and including the settlement between the State and the Louisville and Nashville Railroad Company, beginning in May, 1865, and during the whole progress of this legislation, and of the liquidation, arrangements, and settlements authorized and required by it, and of the dealings between the railroad companies and the State, and of the railroad companies in borrowing money on the security of mortgages on

their property, on the faith that all prior liens on account of the loans by the State of internal improvement bonds had been thereby removed and discharged, the holders of the bonds of the State of Tennessee, in general, had knowledge of all that was taking place; the facts themselves were public, historical, and notorious, and the holders of Tennessee State bonds, in the year 1870, formed a voluntary organization, represented by a committee, for consultation and cooperation in matters of common interest, and kept themselves well advised of each step in the history of the business; and on or about May 1, 1870, said bondholders, through their committee, of which J. J. Donaldson, Esq., was chairman, obtained a legal opinion from Hon. Henry E. Davies and Noah Davis, eminent counsel of the city of New York, affirming that they were owners of a lien under the act of 1852, upon each railroad, for the specific payment of the identical bonds issued to that railroad company, by virtue of a contract, protected by the Constitution of the United States; which opinion was printed in pamphlet form, and not otherwise, and circulated among holders of Tennessee State bonds, and others. That said bondholders took no action upon said opinion, and their committee ceased to exist in 1873. That, in 1877, a similar organization was formed of Tennessee State bondholders, and has been kept up ever since, and that the present suit, and other similar suits now pending, are prosecuted in the name of the complainants, by a committee of such organization.

That at no time did the said holders of Tennessee State bonds, or any one of them, including the complainant or those associated and acting with him in the prosecution of this and similar suits, ever make any demand upon any railroad com-

pany for the payment of any interest on the said bonds, or receive from any railroad company payment of any coupon, or make any objection to any of the acts of the State of Tennessee, inconsistent therewith, or object to the passage thereof, or oppose any payment, settlement, and liquidation, by any railroad company, of its indebtedness to the State, until in May, 1877, at Memphis, in the Circuit Court of the United States, and in April, 1878, at Washington City, in the Supreme Court, it was contended by pleadings and argument, in the case of *Duncan et al.* v. *Merian et al.*, involving the foreclosure of the Mobile and Ohio Railroad, and the marshaling of liens thereon, on behalf of said committee, that the holders of said State bonds were and are entitled to a prior lien, in accordance with the said opinion of said Judges Davies and Davis; that on the 16th day of January, 1878, there was held, in the city of New York, a meeting of holders of Tennessee State bonds, the call for which was signed by the complainant, and others with whom he was then acting, and with whom he is still associated, and who, jointly with him, are prosecuting this and similar suits—namely, Eugene Kelly, Peter Geddes, John T. Terry, and others—and at which they were present and participating, and at which the following preamble and resolutions were adopted, viz:

"*Whereas*, On the 8th March, 1877, at a meeting between a committee of five members of the Tennessee legislature (of which Col. John H. Savage was chairman), and a committee of arbitration (of which Mr. George S. Coe was chairman), to whom had been referred the question of a fair and equitable adjustment between the Southern States in default and their bondholders, the debt of the State of Tennessee was fully discussed, with a view of ascertaining and determining what a

fair and equitable adjustment of it would be; and,

"*Whereas*, At the conclusion of the conference between the committee of the Tennessee legislature and the committee of arbiters, the committee of arbiters made an award that the debt of the State of Tennessee ought to be readjusted by the issue of new bonds, at the rate of sixty per cent. of the total amount of the debt and interest, the new bonds to bear interest at six per cent., payable semi-annually, and the coupons for interest to be made receivable for all taxes and dues to the State; and,

"*Whereas*, The session of the legislature expired by constitutional limitation a few days after the award of the arbiters was rendered, and there was not time to enact a law to give it effect; and,

"*Whereas*, It was very generally understood than an extra session of the legislature would be convened to accept a proposition from the bondholders to compromise the State debt, on the terms of the award of the committee of arbitration, and to enact a law to fully carry it out, the holders of a very large amount of bonds of Tennessee did make and send to the governor propositions of compromise on the terms of said award, and the governor did thereafter convene the legislature in extra session to consider said proposition; and,

"*Whereas*, During the sitting of the legislature, the intervention of other parties, proposing and advocating before it other and different terms of settlement than those considered by the committee of the legislature and the committee of arbitration, and awarded by the latter committee, and agreed to by the bondholders, was prejudicial to the interests of the State of Tennessee, and to her creditors, in so far as it has delayed a settlement; and,

"*Whereas*, The bond holders of Tennessee had neither an agent nor other person to represent

them before the legislature, but confided in the legislature, and fully expected that the senators and representatives of the people of Tennessee would ratify and confirm the award of the distinguished and disinterested gentleman who had acted as a committee of arbitration, and accept the proposition of the bondholders made in accordance therewith, unhesitatingly; therefore,

"*Resolved*, That efforts made by any person who purported to represent the bondholders of Tennessee were entirely unauthorized, and that the declaration alleged to have been made at Nashville, that a settlement could be effected with the bond holders upon a lower basis than that proposed by the committee of arbitrators, of which Mr. George S. Coe is chairman, has no foundation in fact, so far as it relates to the great body of bondholders.

"*Resolved*, That while we deplore the attitude assumed by the legislature, while assembled at Nashville, in December, toward the bondholders, we believe that it resulted from the influence and and unwarrantable interference of other parties than real bondholders, or their representatives.

"*Resolved*, That we have an abiding belief that the people of the great State of Tennessee will not, by the rejection of honest claims which they are abundantly able to pay, suffer a stigma long to rest upon them; the effect of which will be to paralyze the prosperity of the State, subvert its best interests, and engender that demoralization which must ultimately result in losses to its citizens, even far greater than to its creditors.

"*Resolved*, That the people of Tennessee be urged to adopt such legislation as will uphold the honor of the State, and evince proper regard for for the high integrity which has hitherto characterized her citizens.

"*Resolved*, That a committee of five be appoint-

ed, consisting of Eugene Kelly, John T. Terry (of E. D. Morgan & Co.), J. G. K. Duer (of James G. King's Sons), Peter Geddes (of Geddes & Smith), and Dr. R. S. Moran—Eugene Kelley to be chairman—to take such action as, in their judgment, may be to the interest of the bondholders; but with the understanding that no settlement less favorable than the award of the committee of arbitration be accepted.

And this respondent says that on the 11th day of December, 1877, the complainant, C. Amory Stevens, had addressed, by telegraph, from New York, to the Governor of Tennessee, a communicaton, which was laid before the general assembly then in session, as follows:

"NEW YORK, Dec. 11, 1877.

"GOVERNOR JAMES D. PORTER:

"I am a large holder of Tennessee bonds, which have been held for years strictly for investment account. I was a signer of the former petition, sent you through the committee of arbitration; and while I would prefer to have that proposition accepted, yet, if it would require a revenue bill that is deemed by the Legislature to be higher than the State can afford to pay without seriously retarding the prosperity of the people, I prefer to change the original offer, and hereby do change it. I propose to take fifty cents on the dollar. I think this dispatch represents the sentiments of most of the investment holders. They recognize the embarrassed condition of the State, growing out of the war, and are willing to meet the situation in a spirit of liberality, and now ask the Legislature, through your excellency, to reciprocate this feeling, and make a settlement without further delay.

"Please submit this to the Legislature for its action.

"THE ESTATE OF CALVIN STEVENS,

"C. AMORY STEVENS,

"*Trustee.*"

That the public debt of the State of Tennessee, which was the subject of these communications and propositions, amounted at that time, as reported to the General Assembly by the Governor, in the same message which transmitted the proposition made through the committee of arbitration, to twenty-three millions two hundeed and twelve thousand six hundred and six dollars, on the first day of January, 1878, and which consisted partly of bonds issued under the internal improvement acts of 1851, 1852, and the amendments thereto, and those issued for past due interest, and known as funding bonds, and partly of bonds of the State issued for turnpike, capital, and agricultural bureau purposes, and the purchase of the Hermitage.

That on the 21st day of February, 1868, the Legislature of the State of Kentucky passed an act entitled "An Act to amend the charter of the Louisville and Nashville Railroad Company, approved March 5, 1850," a true copy of which act is annexed to the answer of John B. Smith in the *first* named of said causes.

That on or about the 1st day of April, 1868, the Louisville and Nashville Railroad Company, in pursuance of the authority conferred by said act, which had been duly accepted by it, executed and delivered its certain indenture of mortgage of that date, made by and between said company, a duly organized corporation of the State of Kentucky, party of the first part, and James Punnett and Junius B. Alexander, trustees, party of the second part, a true copy of which, except the signatures

and acknowledgment, is annexed to the answer of John B. Smith, in the *first* of said causes, as Exhibit No. 4, thereof; that since the execution and delivery thereof, as aforesaid, the said James Punnett, named therein as one of the grantees, has deceased, and this respondent, a citizen of the State of Kentucky, has been duly appointed in his stead, and has accepted said trust, and has been, so far as necessary, acting in execution thereof, that of said eight million loan, authorized and secured by said mortgage, there have been issued and are now outstanding bonds of said Louisville and Nashville Railroad Company to the amount of seven million and fifty-nine thousand dollars, and of that amount two million four hundred and thirty-three thousand dollars were used by the purchase of Tennessee State bonds, for the purpose of paying the State of Tennessee in part the indebtedness claimed to be due from the Memphis and Ohio and the purchase money of the Memphis, Clarksville and Louisville Railroad Company, and which were so used in pursuance of the terms and plan, according to which said companies, under the authority of the laws of Kentucky and Tennessee, have become consolidated with or owned by the Louisville and Nashville Railroad Company; that said consolidation and purchase were contemplated, as part of its purposes, by said act of the General Assembly of the Commonwealth of Kentucky, of February 21, 1868, but the same was not consummated until after the passage of said acts of the General Assembly of Tennessee, of 1869–70, heretofore referred to, and that the bonds of said Louisville and Nashville Railroad Company, of said eight million loan secured by said mortgage, the proceeds of which were used in the purchase of Tennessee State bonds for the purposes aforesaid, were issued and negotiated in the city of New York, during the year 1870, and the

Tennessee State bonds, purchased therewith, were bought in New York, in open market, at market prices then current, during the period from January 1, 1870, to May 31, 1871; that said deed of trust and mortgage was executed and has been duly registered in accordance with the laws of Kentucky and Tennessee.

That on or about the 1st day of November, 1873, the Louisville and Nashville Railroad Company, a corporation authorized thereto by the laws of Kentucky and Tennessee, executed and delivered its indenture of mortgage of that date to Henry F. Vail, a citizen of the State of New York, and to said John B. Smith, a true copy of which, except the signatures and acknowledgment, is attached to the answer of John B. Smith in the *first* of said causes as Exhibit No. 5, which mortgage was duly registered in the proper offices in the city of Louisville, and in the counties in which said railroad lies; that soon after the execution and delivery of this deed of trust or mortgage the Louisville and Nashville Railroad Company negotiated, issued and sold of the bonds thereby secured, two millions of dollars for full value, but less than par, to purchasers thereof; that the said The Louisville and Nashville Railroad Company, having purchased and acquired the title to the railroad and other property of the Memphis, Clarksville and Louisville Railroad Company, and the same having become by said purchase a part of its line and property on the 15th day of July, 1872, by a certain indenture of that date made between the said Louisville and Nashville Railroad Company, a corporation created, organized and existing by and under the laws of the State of Kentucky, and likewise existing and recognized and possessing chartered rights and privileges by and under the laws of the State of Tennessee, party of the first part, and this respondent, of Louisville, in

the State of Kentucky, and Junius B. Alexander, of the city of New York, parties of the second part, a true copy of which, except the signatures and acknowledgment thereof, is attached to the answer of John B. Smith, in the *fourth* case above named, as Exhibit No. *one* thereof; that said mortgage or deed of trust was duly executed by the parties thereto, in conformity with the law of the States of Tennessee and Kentucky in that behalf, and was duly registered and recorded as required thereby; that all said twenty-five hundred bonds of two hundred pounds sterling, with coupons attached, as described in said mortgage, were negotiated and sold, and the proceeds thereof received by the Louisville and Nashville Railroad Company, in the city of London, in England, for full value, but less than par, to purchasers thereof

That there was delivered to the Memphis, Clarksville, and Louisville Railroad Company, on account of their railroad, various internal improvement bonds of the State of Tennessee; that said bonds, to the amount of one million five hundred and eighty-two thousand dollars, were received by or on behalf of the Memphis, Clarksville and Louisville Railroad Company, either through its own officers, or by Receivers in possession of its railroad, under appointment of the governor of the State, and were by said company, or by said Receivers, negotiated and sold, in pursuance of the law, to *bona fide* holders, but none prior to March 18, 1858, and the proceeds of said bonds were applied as directed by the laws under which they were issued; that of said sum of one million five hundred and eighty-two thousand dollars of State bonds, issued as aforesaid, in aid of the Memphis, Clarksville and Louisville Railroad, the amount of one million and forty-two thousand dollars thereof was issued to said company, in various

sums and at different times, between the 17th day of March, 1858, and the 21st day of February, 1861, and all were issued under the provisions of the act of February 11, 1852, and acts amendatory thereof; and that forty thousand dollars of said bonds were issued to said company on March 27, 1866, under the provisions of the act of February 8, 1854, amendatory of said act of February 11, 1852, and four hundred thousand dollars thereof were issued to G. T. Lewis, a Receiver in possession of said railroad, by appointment of the Governor of the State, between April 14, 1866, and June 13, 1866, as provided in the act of January 18, 1866, to amend said act of February 11, 1852, and one hundred thousand dollars thereof, as authorized by the act of May 24, 1866, to incorporate the Tennessee Pacific Railroad Company, and for other purchase, by the terms of which last mentioned act the governor was authorized to execute a bond for the purpose of railroad machinery, cars, and all other material purchased for the use and benefit of the Memphis, Clarksville and Louisville Railroad from the United States Military Railroad Department at Nashville, of the United States; that the State of Tennessee has failed to pay the interest accruing on its outstanding bonds since the 1st day of July, 1876, having failed to pay the coupons falling due on that day; that the Memphis, Clarksville and Louisville Railroad Company did not pay interest accruing upon its said indebtedness, but failed to do so, and to pay the amounts required by the said several laws on account of the sinking fund, and became and was in default by reason thereof, so that it was claimed by the State that on the 1st day of January, 1871, the said Memphis, Clarksville and Louisville Railroad Company was indebted to the State, on account of said interest in arrear, in the sum of eight hundred and seventy-two thousand

one hundred and twenty-five dollars and ninety-two cents, besides four hundred and ninety-nine thousand six hundred and sixty-nine dollars and ninety cents, on account of the purchase of machinery, cars, and material from the United States, authorized as aforesaid by the act of May 24, 1866, making the aggregate of indebtedness, claimed by the State, of that date, for which said company was liable to it, of two million nine hundred and fifty-three thousand seven hundred and ninety-five dollars and ninety-two cents.

That the bonds authorized by the act of the General Assembly of the State of Tennessee, passed February 1, 1860, and called second mortgage bonds were issued by said company, and negotiated, that they are the same referred to in the mortgage of the Louisville and Nashville Railroad Company, to the said John B. Smith, and the said Junius B. Alexander, of the 15th day of July, 1872, as having been purchased by the Louisville and Nashville Railroad Company, and by it conveyed to them.

That on the 1st day of June, 1871, the Memphis and Ohio Railroad Company, party of the first part, executed and delivered its certain deed of indenture of that date, to and with John B. Smith, of Louisville, in the State of Kentucky, and James W. Alexander, of the city and State of New York, parties of the second part, a true copy of which is attached to the answer of John B. Smith in the case of the complainant suing upon bonds of the State of Tennessee, issued in aid of the construction of the Memphis and Ohio Railroad, which deed, it is admitted, was duly registered according to the laws of the State of Tennessee; that said thirty-five hundred bonds, described in and secured by said deed and mortgage, were duly issued by said railroad company, negotiated and sold to *bona fide* purchasers, for full value, but at less than par, and

that the proceeds of the sale of the said bonds, which were indorsed before negotiation by the Louisville and Nashville Railroad Company, were used to replace advances made by the said company for the Memphis and Ohio Railroad Company, and for the purchase of bonds of the State of Tennessee, which the State of Tennessee received in discharge of the indebtedness claimed to be due from said railroad company to it; and, afterward, the Memphis and Ohio Railroad Company was consolidated with the Louisville and Nashville Railroad Company, and the said mortgaged property became vested in the Louisville and Nashville Railroad Company, and that payments of interest accruing on the indebtedness of the Memphis and Ohio Railroad Company claimed to be due to the State of Tennessee, were regularly made by said Louisville and Nashville Railroad Company, then in possession of the Memphis and Ohio Railroad, as lessee thereof, to the State of Tennessee every six months from July, 1867, to July, 1871, each of which semi-annual payments amounted to $71,883.30, and were made partly in cash, and partly in past due bonds and coupons of the State of Tennessee.

That, on the 1st day of July, 1870, the Nashville and Decatur Railroad Company entered into an indenture with Philo C. Calhoun, Richard T. Wilson, and Adrian Iselin, then and now citizens of the State of New York, parties of the second part, a true copy of which is filed as "Exhibit No. 2" to the answer of Charles Diggelman and others, in the case of the complainant suing upon bonds of the State of Tennessee, issued in aid of the construction of the Tennessee and Alabama Railroad, which indenture was duly registered in pursuance of the laws of the State of Tennessee; that the Nashville and Decatur Railroad Company is a corporation of the States of Tennessee and Alabama, formed by

the consolidation of the Tennessee and Alabama Railroad Company, the Central Southern Railroad Company, and the Tennessee and Alabama Central Railroad Company; that the bonds of the Nashville and Decatur Railroad Company, secured by the said mortgage to said Calhoun, Wilson, and Iselin, were issued for the purposes therein authorized, and were negotiated and sold in the city of New York, to *bona fide* purchasers, for full value, but at less than par, and the proceeds thereof used for the purchase of bonds and coupons of the State of Tennessee, bought in open public market in said city, at the prevailing market rates, and which were afterward delivered to and accepted by the State of Tennessee, at par, through its comptroller, in payment of and satisfaction for the debt claimed to be due the State from said companies, on account of said internal improvement bonds originally loaned to them; that the respondents, Charles Diggleman, Marius A. Sorchan, and Sophie Milius von Willer, purchased and held the amount of bonds stated in their answer, respectively, in good faith and for full value, but at less than par; and that the several respondents, whose names are in the list, marked "Exhibit No. 1," attached to the said answer, each purchased and still holds of said bonds the several amounts set opposite their respective names in said list, in good faith and for full value, but at less than par; a true copy of one of said bonds is set out in "Exhibit No. 2" to said answer. That the Nashville and Decatur Railroad Company made a settlement with the State of Tennessee, through its comptroller, of its debt claimed to be due to said State on account of the bonds of said State issued in aid of the construction of the Tennessee and Alabama, and the Central Southern Railroad, and the interest thereon, as made up and adjusted to January 1, 1871, in the sum of $2,702,-

997.10, as shown in "Exhibit No. 3" to said answer, which is a correct copy of the original, which was paid in bonds and coupons which had been purchased at less than par.

"Exhibit No. 4," attached to the answer, is a true copy of the lease of the Nashville and Decatur Railroad Company to the Louisville and Nashville Railroad Company.

GEORGE HOADLY,
On behalf of Complainants.

STANLEY MATTHEWS,
On behalf of John B. Smith, Charles Diggleman, and others, Defendants.

United States Circuit Court, 1

MIDDLE DISTRICT OF TENNESSEE.

In Equity.

CALVIN AMORY STEVENS, on behalf of Holders of Internal Improvement Bonds of Tennessee, issued to the LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

vs. 2

THE LOUISVILLE AND NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

3

CALVIN AMORY STEVENS, on behalf of Holders of Internal Improvement Bonds issued to the CENTRAL SOUTHERN RAILROAD COMPANY,

vs.

THE NASHVILLE AND DECATUR RAILROAD COMPANY, *et al.* 4

5

CALVIN AMORY STEVENS, on behalf of Holders of Internal Improvement Bonds of Tennessee, issued to the TENNESSEE AND ALABAMA RAILROAD COMPANY,

vs.

6 NASHVILLE AND DECATUR RAILROAD COMPANY, *et al.*

CALVIN AMORY STEVENS, on behalf of Holders of Internal Improvement Bonds of Tennessee, issued to the MEMPHIS AND OHIO RAILROAD COMPANY,

7

vs.

THE LOUISVILLE AND NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

8

CALVIN AMORY STEVENS, on behalf of Holders of Internal Improvement Bonds of Tennessee issued to the MEMPHIS, CLARKSVILLE AND LOUISVILLE RAILROAD COMPANY,

vs.

THE MEMPHIS, CLARKSVILLE AND LOUISVILLE RAILROAD COMPANY, AND THE LOUISVILLE, NASHVILLE AND GREAT SOUTHERN RAILROAD COMPANY.

It is stipulated by and between the parties to the above-named suits, in order to avoid the trouble, expense and delay of formal proof, that the following are facts proven in these causes:

First.—In reference to the bonds of the State of Tennessee loaned to the railroad companies involved in these causes and their predecessors in interest under the Internal Improvement Laws of the State of Tennessee, as a general proposition, subject probably to some exceptions, the purchasers of said bonds did not know when they purchased the same originally to what companies they had been issued. The information contained in receipts taken by the Secretary of State from the companies as to the bonds loaned before the late war was never made known except as it may be claimed to have been made known by said receipts and by the report of

13 a joint select committee of the Legislature of Tennessee, appointed by the General Assembly of 1857-8, to investigate the offices of Comptroller and Secretary of State and other purposes, made August 11, 1858, and by a report made by John C. Burchs Comptroller, in 1875. The information relative to the bonds loaned after the war was not made public except as it may be claimed to have been made public by the receipts themselves until a report was made by G. W. Blackburn, Comptroller
14 of Tennessee, in October, 1869.

The bonds were principally negotiated or transferred either in Tennessee or New York. They were either payable to bearer, using those words, or to blank or order, leaving the blank unfilled, or, if filled, it was done with some name other than the companies to whom they were loaned.

Answer No. 2,462, pp. 3 and 4.

Second.—The name of the railroad company to
15 which the bonds of the State of Tennessee were loaned under said law does not in any way appear either in or upon the bond.

Ans. No. 2,462, p. 4.

Nor the name of the railroad company to which the bonds of the State of Tennessee were issued under other laws passed by the Legislature at the session of 1852, including those issued under the act of January 15,1852, does not appear in any way
16 either in or upon the bond.

Third.—That up to to the passage of the Internal Improvement Law of February 11, 1852, the State of Tennessee had never defaulted upon the interest of her public debt, and the straight six per cent. bonds of the State were quoted on the New York Stock Exchange as follow s:

5

Quotations of sales of Tennessee State bonds, taken from the official reports of the New York Stock Exchange, as published in the New York *Journal of Commerce*, during the year 1852 : 17

Date of Report.	*Amt. of Sale.*	*Price.*
1852, February 24,	1,000 6's,	102.
" April 9,	7,000 6's '90	105.
" May 31,	2,000 5's,	92.
" June 17,	2,000 6's,	110.
" July 19,	2,000 5's,	92.
" December 9..	5,000 6's '68,	106.

18

Fourth.—The report of J. G. M. Ramsey, Agent of the State of Tennessee for the sale of bonds issued to the East Tennessee and Georgia Railroad, made to the Governor of the State, dated September 20, 1851, may be read by complainant on his behalf without objection to its competency. Respondents reserve the right to introduce any proof they may obtain in rebuttal of the facts stated in that report.

19

Fifth.—The Tennessee and Alabama Railroad Company received from the State three hundred bonds in July and September, 1854. The English merchants who sold them their iron failed to deliver it according to contract, and the company refused to pay them, but they reserved one hundred and forty-three of the bonds until the dispute could be settled, and they continued in the company's possession until after August, 1855. On the 30th June, 1859, said company had on hand 389 State bonds, 20
301 of which were issued as early as June 4th, 1858. On June 30th, 1860, said company had on hand 303 State bonds, 201 of which had been issued as early as June 4th, 1858. Many other instances of a similar kind could be given where the various railroad companies preferred to use their other means in ironing and equipping the first part of their roads, reserv-

21 ing their State bonds for ironing and equipping other parts of their roads. The companies cut the coupons from these bonds, and with them paid the interest on these bonds into the Bank of Tennessee, as they did the interest on those bonds that had been negotiated.

Ans. No. 2,462, pp. 8 and 9.

In 1852 the taxable property of Tennessee was $177,420,305. The debt of the State then amounted
22 to only $3,992,856.66, and the rate of State tax was only 11½ cents to the hundred dollars. After the loan of bonds to railroads there was no difference in the money market between prices of the bonds loaned to railroads or those issued by the State to raise the capital of the Bank of Tennessee, or to build her State house; nor was there any difference in price between the bonds loaned to the most valuable railroads and those loaned to the most worthless, except that in both of the above cases a difference of
83 from two to five per cent. on limited transactions has arisen within the last two years, in the open market in New York, but no difference has ever existed on the Stock Exchange of New York, owing to the way in which Tennessee bonds are called at said Exchange.

Respondents have caused thorough investigation to be made in each of their offices, and have been unable to find any evidence that there was any record made and kept by them of the numbers,
24 dates, or series of the bonds issued to them, and have no knowledge, information, remembrance or belief in regard thereto (p. 12). The proceeds of these bonds were applied as directed by the laws under which they were loaned to railroads (p. 13).

The Comptroller's reports show that the Sinking Fund Commissioners credited each railroad company with the annual amounts paid in, but in their

investment thereof selected any bonds of the State 25
that were offered for sale. Thus, from the Comptroller's report of 1859 (page 59), it seems that the Tennessee and Alabama Railroad Company paid to the Treasurer $6,400, which was invested in one bond endorsed by the State for the East Tennessee and Georgia Railroad Company, four State 5¼ per cent. bonds, and three State five per cent. bonds. Not one of the bonds purchased with the money paid in by that company had ever been issued to it. The idea of the State 26
at that time was to pay the interest on all the bonds that were paid into the Railroad Sinking Fund, and that the accumulation would be so rapid as to certainly raise a fund that would pay the bonds by their maturity.

In the Comptroller's report of 1859 (p. 16), he states that $82,840.95 paid in by the railroad therein named, invested, with accrued interest, had purchased bonds amounting to $109,750, which paid an annual interest of $6,417.50, or 7¾ per cent. on the 27
investment.

The State had loaned her own bonds to some of her Internal Improvement Companies; she had endorsed the bonds of some of the other companies, and has issued her own bonds to pay for her State House, and for other purposes. The result was that she had several different series of bonds issued under different laws and maturing at different times. Series A were 5 per cent. bonds issued under Act of 1838, maturing in thirty years. They were issued 28
principally to pay for stock subscribed by the State in various turnpikes and railroads, and aggregated $1,893,000. Series B were known as "White bonds, six per cent., issued under the Act of February 11th, 1852." Numbers 1 to 7,908 of this series mature in 1892, while numbers 7,909 to 11,806, do not mature until 1898. This series aggregated $11,806,000.

Series C were also known as "White bonds, six per cent., issued under the Act of February 11th, 1852," and due in 1898. This series aggregated $1,878,000. Series B and C represented the State Bonds loaned to the various railroads under the said Act of February 11th 1852, before the war. Under the Act of March 20th, 1860, to illustrate, the East Tennessee & Virginia Railroad Company paid in fifteen of their own endorsed bonds, and two regular State bonds; the Memphis & Charleston Railroad Company paid in sixteen State bonds, and $2,960 in cash; the Memphis & Ohio Railroad Company paid in six State bonds; and so have the McMinnville & Manchester Railroad, and the Tennessee & Alabama Railroad.

Though the various Acts of the Legislature and the reports of the Comptroller and of the Sinking Fund Commissioners, referred to in the answers, were all public, no bondholder was ever heard to protest against the authority assumed by the State, or against the cancellation and destruction of the securities which the companies had paid into the Sinking Fund. An opinion, however, of Judges Davis and Davies was obtained, addressed to J. J. Donaldson, Chairman of Committee of bondholders, dated May 2, 1870, which is made Exhibit X to this stipulation. No bondholders ever presented a State coupon to any railroad company for payment. No Tennessee railroad company had any banker or other correspondent in New York to pay the coupons on the State bonds loaned to it. No company ever retained in its possession the coupons that had been paid on the bonds loaned to it.

As long as the Bank of Tennessee was in operation it was regarded as the fiscal agent of the State. All of its directors were appointed by the State. They were required to report to the State and were constantly kept under its control. The State Treas-

urer kept none of the State funds in his own hands, 33
but deposited all the revenues of the State in the
Bank of Tennessee, and could only check for the
same on checks countersigned by the Comptroller.
The Bank of Tennessee paid the interest on all the
State bonds, without reference to the purpose for
which they were issued. This is shown by the re-
port of the Comptroller to the Session of 1851-2,
when the general Internal Improvement Law was
passed. (See his report, page 65.) The Merchants'
Bank of New York and the Bank of North America 34
of Philadelphia, were the correspondents through
whom the Bank of Tennessee paid the interest
on the State debt. These correspondents would re-
turn the coupons to the Bank of Tennessee, by
whom they were returned to the State. There was
one account on the books of the Bank of Tennessee
headed "Treasurer of Tennessee," which was
credited by the revenues of the State deposited by
the Treasurer, and by the dividends derived from
the State's stock in the bank, and the various in- 35
ternal improvement companies in which the State
was a stockholder, and was debited by the interest
on the entire State debt paid by the bank of Ten-
nessee, and by such other sums as were drawn by
the Treasurer under appropriations made by law.
There was also an account on the books of the Bank
of Tennessee headed "Interest paid on State Bonds,"
the object of which was to show the exact amount
paid on that account, but it shows nothing as to
whom, or for what purpose the bonds were issued 36
upon which such interest was paid. There was also
an account headed "Railroad Companies, for In-
terest," showing the amounts and dates of all pay-
ments into the bank by the different companies, but
it does not show that the payments were to be ap-
propriated to the interests upon any particular

37 bonds of the State; nor did the bank, in fact, know what bonds had been issued to any named railroad.

The funds paid in by all the railroads were transferred either to the Treasurer's general account or to the account headed "Interest on State Bonds."

The Bank of Tennessee kept entries in its books showing the amount which each railroad company paid in for account of its interest. It is stipulated that extracts from the books of the bank may be read by either party. The moneys paid in by the
38 railroads were sent by the Bank of Tennessee, with other funds to New York and Philadelphia, where they were paid out by the correspondents aforesaid upon coupons of the State, making no distinction between the different bonds of the State.

These correspondents kept no accounts with the railroad companies, and did not know to whom the bonds were issued, the coupons of which they were paying.

39 The Merchants' Bank of New York City was the correspondent in New York, through whom the Bank of Tennessee paid nearly all the interest-coupons payable at New York on the bonds of the State of Tennessee, issued for all purposes, and this agency continued from 1852, through the years 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, and to April, 1861.

The ledgers of the Merchants' Bank of New York and the books in which they took the receipts of
40 coupon-holders and the detailed statements of paid coupons forwarded regularly every six months by the Merchants' Bank to the Bank of Tennessee, show that as to all the bonds issued under the Act of 1851–2, Chap. 151, or Acts amendatory thereof, the Merchants' Bank did not keep, nor attempt to keep, an account showing the railroad company to whom the bonds were issued, the coupons on which

were paid, nor did they attempt to classify or iden- 41
tify the coupons, when paid, as being coupons from bonds issued to any particular railroad company.

The only accounts shown on the books of the Merchants' Bank for said years with the Bank of Tennessee were two: first, the general reciprocal account, on one side of which appeared the gross sums of money to the credit of the Bank of Tennessee, and on the other its checks and drafts; secondly, an interest or coupon account, showing the amount of coupons paid, and this account 42
was credited with and balanced by checks drawn by the Bank of Tennessee upon its regular account and balance in the Merchants' Bank at the time, without any discrimination as to the coupons to which the payments were applied.

This admission is made alone to save the expense and trouble of making copies of the entries from said books of the Merchants' Bank, and states truly the facts as they actually appear on said books.

When the State of Tennessee was in default in the 43
payment of interest on any of its bonds it was in default on all of them then matured, except such as were held by the East Tennessee University and the Commissioners of the Common School Fund, which were provided for by special legislation.

Each coupon could be identified when detached from its bond as having been separated from their respective bonds, which identification existed by means of the color, letter and number of the instruments. 44

In the Treasurer's books an account was headed "Bank of Tennessee," the reverse of the account kept under his name at the said bank. There is also an account headed "Interest on Capital Bonds," in which is shown the interest paid on the bonds issued to pay for the State House.

There is also an account headed "Interest on In-

45 ternal Improvement bonds." It shows the gross amount paid out on such bonds, but it does not show by whom the money was furnished, nor does it show the number or character of the bonds on which the interest was paid. There are no separate accounts with the different railroads to be found on the Treasurer's books. With the exception of the distinction between Capitol and Internal Improvement bonds, the Treasurer made no difference between the various bonds of the State, but treated
46 all as equally the obligations of the State.

The interest on the bonds loaned to respondents was not paid after July 1, 1861, except as hereinafter stated. And though the United States Circuit Court was open in Nashville, after its capture by the United States army in February, 1862, no bondholder ever claimed the right to a receiver for nonpayment of interest.

The copies of the resolution and report attached as Exhibits A and B, to the answer of the L. & N.
47 R. R. Co. No. 2,462, are admitted to be correct copies. They were published in the acts and journals of that session.

The bonds and coupons were paid by the L. & N. R. R. Co. as therein stated. The bonds cost 68 4-10 cents per dollar, which includes per cent. of overdue coupons. The bonds paid to the State by the Memphis & Ohio Railroad Company cost 63 9-10 cents on the doilar. The bonds with which the Memphis, Clarksville & Louisville Railroad was
48 bought, cost 63 7-10 cents on the dollar. The above prices include per cent. of overdue coupons which price includes the overdue coupons. And no one ever controverted the right of the State to make a settlement until this bill was filed, except so far as the opinion addressed by Judges Davies and Davis to J. J. Donaldson as Chairman of the Committee of Tennessee bondholders circulated in pam-

phlet in New York City and some in Europe in 1870, may be so considered.

The Louisville & Nashville Railroad Company on April 8th, 1868, executed a mortgage or trust deed duly registered, upon its main stem and branches, to James Punnett and Junius B. Alexander, citizens of the State of New York, to secure an issue of eight millions of dollars of bonds of which $7,070,000 were sold in Europe and are now outstanding in the hands of European holders for value, who had not received any notice of the existence of any claim to a statutory lien on the roads, except such as may be implied from the Tennessee laws of 1851-2, and their amendments, and the fact that the said opinion of Judges Davies and Davis addressed to J. J. Donaldson as Chairman of the Committee of bondholders was circulated as aforesaid.

The said Punnett has since died, and John B. Smith, a citizen of Louisville, Kentucky, has been substituted as trustee. On November 1st, 1873, said company executed another mortgage or trust deed, duly registered, conveying the same property and also the Memphis & Ohio and the Memphis, Clarksville & Louisville Railroads to Henry F. Vail, a citizen of the State of New York, and John B. Smith, a citizen of Louisville, of Kentucky, to secure an issue of four million dollars of bonds, of which two million are now outstanding in the hands of holders for value, who had not received any notice of the existence of any claim to a statutory lien on the roads, except such as may be implied from the Tennessee laws of 1851-2, and their amendments, and the fact that the said opinions of Judges Davies and Davis addressed to J. J. Donaldson, as Chairman of the Committee of bondholders, was circulated as aforesaid. In March, 1865, the bonds of the State of Tennessee were of the market value of fifty cents, but in December, 1865, they were at 92

53 cents in the dollar, as stated by the Financial Review of New York. The Nashville & Decatur Railroad Company, created by the consolidation of the Tennessee & Alabama Railroad Company and the Central Southern Railroad Company, in March, 1871, paid to the State of Tennessee $2,368,176 in bonds and coupons of the State. Said company had raised the money to buy the bonds and coupons paid in by them, by mortgaging the road for $2,100,000, in 1870, and selling the company's bonds
54 in the New York market. None of the State bondholders attempted by any legal proceedings to assert any rights in opposition to the course which that company was pursuing except so far as obtaining the opinion of counsel above referred to. And the Louisville & Nashville Railroad Company leased said Nashville & Decatur Railroad in May, 1871, agreeing to pay $2,450,000, of the debts of said company, and an annual six per cent. dividend upon its capital stock of $1,512,184.11, and in addition
55 to all this, the Louisville & Nashville Railroad Company have spent $ over and above their receipts in the repair and operation of said road.

On May 25th, 1871, the Memphis & Ohio Railroad Company paid the State of Tennessee $2,468,376.50 in bonds and coupons of the State. On the first of June, 1871, the Memphis & Ohio Railroad Company mortgaged its road for $3,500,000 of bonds, which were originally sold and are still held in Europe by
56 holders, who had not received any notice of the existence of any claim to a statutory lien on the roads except such as may be implied from the laws of Tennessee of 1851-2, and their amendments, and the said opinion of Judges Davies and Davis addressed to J. J. Donaldson as Chairman of the Committee of Bondholders, circulated as aforesaid. No State bondholders having made any complaint to

Court or addressed to them, the Louisville & Nash- 57
ville Railroad Company consolidated with said Memphis & Ohio Railroad Company, endorsed said $3,500,000 of said bonds, and have since expended $ over and above their receipts in the repair and operation of said road.

In January, 1871, the State of Tennessee filed its bills in the Chancery Court at Nashville, Tennessee, against the Memphis, Clarksville & Louisville Railroad Company, to whom State bonds had been loaned, upon which such proceedings were had as 58
will appear by a certified transcript of the record to be filed in these cases. The State bondholders have never sought to review or reverse said decree.

On August 1st, 1872, the Louisville & Nashville Railroad Company placed a mortgage on said last named road for $2,465,000 of bonds which the Louisville & Nashville Railroad Company endorsed, and which were originally sold in Europe in 1872, and are still held there by holders for value, who had not received any notice of the existence of any 59
claim to a statutory lien on the roads, except such as may be implied from the Tennessee laws of 1851-2, and their amendments, and the said opinions of Judges Davies and Davis addressed to J. J. Donaldson as Chairman of the Committee of Bondholders, circulated as aforesaid. Said Louisville & Nashville Railroad Company have also expended $ over and above their receipts in the repair and construction of said road.

With the exception of some interest paid in 60
1867-8, and some paid in 1874-5, the State of Tennessee has paid no interest since the commencement of the late war, and the remainder of the interest has all been funded into new bonds of the State, except that which matured since January 1st, 1876, and it has neither been funded nor paid. The Act of 23d November,

1865 (see Public Acts, 1865–6, pp. 11 and 12) was carried into execution as to all the railroads in this litigation.

All, or nearly all, of the past due coupons referred to in said Act were fuunded by the present bondholders or those under whom they claim. The coupons were delivered to the State, pasted in books kept in the comptroller's office, and new bonds received from the State for the old coupons. A new bond might have been for coupons on bonds loaned to several different railroad companies or on bonds not loaned to any railroad company, and so of the practice under the funding Act of 1873.

The Nashville and Decatur Railroad Company and the original companies forming the consolidation had received State bonds, which, with interest and sinking fund, amounted to $2,368,176. They met their interest in January, 1869, but fell behind $15,955.26 on their interest for July, 1869.

This authorized the State to appoint a receiver; and experience on other roads had taught that in every instance these State receivers had run the roads down, without ever reducing the indebtedness.

In October, 1869, the debt of Tennessee was $37,590,027.08, of which about $30,000,000 were for bonds loaned to railroad companies, with funded interest thereon. The State's bonds ranged in New York in 1869 from 70 cents in January to 40½ cents on the dollar in December, there being no distinction between bonds loaned to railroads and any other bonds.

On July 1, 1870, the Nashville and Decatur Railroad Company executed a mortgage or trust deed upon their railroad property, rights and franchises, conveying the same to Philo C. Calhoun, Richard T. Wilson and Adrian Iselin, all citizens of the

State of New York, to secure first mortgage bonds 65
to the amount of $2,100,000 issued and negotiated to raise the money to buy the State bonds to pay the debt due from said company. Said mortgage was duly executed and registered. The bonds are now outstanding in the hands of persons who for most part are citizens of States or countries other than Tennessee, holders for value, who had not received any notice of the existence of any claim to a statutory lien on the roads, except such as may be implied from the Tennessee laws of 1851-2, and 66
their amendments, and the said opinion of Judges Davies and Davis addressed to J. J. Donaldson as chairman of the Committee of Bondholders, circulated as aforesaid.

The following is a copy of one of said bonds:

[*Form of Bond.*]

No.. UNITED STATES OF AMERICA. $1,000.

STATES OF TENNESSEE AND ALABAMA. 67

THE NASHVILLE AND DECATUR RAILROAD COMPANY.

7 *per cent. First Mortgage Sinking Fund Bond.*

The NASHVILLE AND DECATUR RAILROAD COMPANY promise to pay to the holder of this Bond, on the first day of July, one thousand nine hundred, for value received, the sum of *one thousand dollars*, in lawful money of the United States, in the City of New York, with interest in the meantime at the rate 68
of *seven per cent.* per annum, payable semi-annually on the first day of January and July of each year on delivery of the annexed interest warrant.

U. S. Int. Rev. Stamp. $1.05.

This bond, with others of like tenor and date, amounting in the aggregate to a sum not exceeding two million one hun-

dred thousand dollars, is secured by a first mortgage on the railroad and franchises of said company made by Philo C. Calhoun, Richard T. Wilson, and Adrian Iselin, and is entitled to the benefit of a sinking fund, as set forth in the deed of trust.

This Bond shall pass by delivery or by transfer on the books of the company. After a registration of ownership, certified hereon by the Transfer agent of the Company, no transfer except on the books of the company shall be valid unless the last transfer be to bearer.

SECURED BY FIRST MORTGAGE.

ONE THOUSAND DOLLARS.

In Witness Whereof, the said Nashville and Decatur Railroad Company has caused this bond to be signed by its President and Secretary, and its corporate seal to be hereunto affixed, at the City of Nashville, Tennessee, on the first day of July, Anno Domino one thousand eight hundred and seventy.

J. W. SLOSS,
President.

[SEAL.] G. W. SEAY,
Secretary.

I certify that the Nashville and Decatur Railroad Company has paid off the debt to the State of Tennessee, which was created by the loans of the bonds of said State, and for interest thereon, and that this bond is secured by a first mortgage, and is issued under authority of law, and takes the place of the lien which was held by the State.

ED. R. PENNEBAKER,
Comptroller of the State of Tennessee.
By P. C. CALHOUN,
Prest. Agent.

[*Form of Coupon.*]

THE NASHVILLE AND DECATUR

$35 Railroad Company $35

will pay the bearer in the City of New York Thirty-five dollars in lawful money of the United States, on the first day of.... 18.. for semi-annual interest on bond No....

G. W. SEAY,
Secretary.

73

[*Trustees' Certificate.*]

We certify that this bond is one of a series not exceeding two million one hundred thousand dollars, described in and secured by the deed of trust or mortgage mentioned herein, bearing date first day of July, Anno Domini one thousand eight hundred and seventy, which was duly recorded. 74

P. C. CALHOUN,
R. T. WILSON,
ADRIAN ISELIN,
Trustees.

75

The State Comptroller in his report in 1869, page 50, suggested to the Legislature the propriety of selling a sufficient number of the railroads for bonds of the State, to lessen the State's liabilities eight or ten millions of dollars, he believing with such reduction the State's liabilities could be regularly and certainly met His report in 1867 (page 67) shows that the railroads then owed $800,000 for interest due July 1st, 1867, which the State had paid on the bonds loaned them.

The Comptroller in his report for 1867 states that the records of his office show that from the railroads then in the hands of Receivers scarcely a dollar had been received during the past fiscal year (page 13). If the State had forced a sale of all the delinquent railroads so large an amount of such property thrown upon the market, in the depressed financial condition of the country, would have sacrificed alike the 76

77 interest of the companies and the State, but by allowing the companies to pay their debts in any of the bonds of the State, and giving them a reasonable time in which to get the bonds, they were enabled to procure them at reasonable rates, and by reducing the aggregate debt of the State, they increased the ability of the State to pay, and the bonds of the State which were quoted as low as 40½ in December, 1869, were quoted as high as 91¼ cents on the dollar in March, 1874, at the New York
78 Stock Exchange.

An elaborate opinion was written at the instance of the Nashville and Decatur Railroad Company, by Colonel Pryor, which was concurred in by the Hon. E. H. East, of Nashville, who was then and is now one of the most eminent lawyers of Tennessee. The object of asking the opinion was not to satisfy said company, but to place the question fairly before the money markets of the world, where said company was trying to raise the means to buy the
79 bonds to deliver to the State as they claimed in payment of their debt to the State. The respondents knew nothing of any opinion of New York counsel to the same effect that was published at or about that time. It is true that the transaction in all its entirety was fully understood by the N. & D. R. R. Co., and they supposed it was also understood by the purchasers of their new bonds, as the legislation under which they were issued was referred to in the mortgage, and the opinion of Colonel
80 Pryor was published to give information on the subject. Said company acted upon the advice of counsel, and in confidence that said advice was correct.

It is stipulated that the amount of bonds received from the State of Tennessee, the dates of default stated in the pleadings, are true.

It is admitted that there had been issued to the

Memphis and Ohio Railroad Company State Bonds which, with interest and sinking fund, amounted in year to $2,396,110. They met their interest in January, 1867, but failed to pay their interest for July, 1867. The Governor, however, felt bound to comply with the law and appointed a Receiver to take charge of the road; said company were also heavily indebted for labor, materials and supplies. The earnings were insufficient to pay operating expenses, and additional means were needed to put the road in a safe condition. 81 82

The Louisville and Nashville Railroad Company being greatly interested in the efficient operation of said road as a part of the Louisville and Memphis line, had already advanced to said Memphis and Ohio Railroad Company $125,000, and then agreed to lease their road, to pay the interest on the State Bonds to the State of Tennessee, and to pay the debts of said company incurred since the war in the reconstruction and operation of the road. They were to reimburse themselves, if possible, from the earnings of the road, but if there should be a surplus of earnings, it was to be paid over to the Memphis and Ohio Railroad Company (p. 33). 83

The Louisville and Nashville Railroad Company paid the interest upon the bonds loaned to said last-named road. Said payments were made regularly each six months from July, 1867, to July, 1871. Each semi-annual payment amounted to $71,883.30, and they were made mostly in cash, though some were made in past-due bonds and coupons of the State. During most of this time the State was in default upon the interest due on the bonds loaned to the Memphis and Ohio Railroad Company, and was using for other purposes the money which the Louisville and Nashville Railroad Company were paying to enable her to meet interest on said bonds. 84

85 On the 25th of May, 1871, the Memphis and Ohio Railroad Company paid the State of Tennessee $2,468.376.60, in bonds and coupons of the State, as the company claimed in full of all claims and demands of said State against said company, and in full discharge and satisfaction of all liens upon the property, rights, franchises and privileges of said company originating in, or created by the loan or issuance and delivery to said company of the bonds of said State under or by virtue of the Act of the
86 Legislature of said State, passed the 11th day of February, 1852, entitled, "An Act to create a system of internal improvements in this State," and under the Acts amending the same, or any other Acts of said Legislature.

The Comptroller of said State executed and delivered to said company a receipt evidencing said payment, and a copy of said receipt is hereto filed, marked Exhibit C., to the Mem. & O. Answer.

On June 1st, 1871, said Memphis & Ohio Rail-
87 road Company executed a mortgage or trust deed upon their railroad property, rights and franchises conveying the same to Junius B. Alexander, a citizen of New York, and John B. Smith, a citizen of Kentucky, to secure $3,500,000 of claiming or purporting to be first mortgage bonds. Said mortgage was duly executed and registered, and the bonds originally negotiated in Europe in 1871, are now outstanding in the hands of holders there for value, who had not received any notice of the existence of
88 any claim to a statutory lien on the roads, except such as may be implied from the Tennessee laws of 1851, '2, and their amendments, and the circulation as aforesaid of the said opinion of Judges Davies and Davis, and addressed to J. J. Donaldson, as Chairman of Committee of Bondholders.

After the Memphis and Ohio Railroad Company had delivered the bonds to the State as aforesaid,

and had mortgaged their road, the Louisville & 89
Nashville Railroad Company endorsed $3,500,000
of bonds secured by said mortgage, and on Octo-
ber 9th, 1872, entered into formal articles consoli-
dating the two companies as stated above, the con-
solidation becoming bound for all the debts of the
Memphis & Ohio Railroad. The articles of consol-
idation were duly registered in October, 1872, in all
the counties in Tennessee through which the Mem-
phis and Ohio Railroad ran.

On November 1st, 1873, the Louisville & Nash- 90
ville R. R. Co. executed a mortgage on their main
stem and branches, including the Memphis & Ohio
Railroad, conveying the same to Henry F. Vail, a
citizen of New York, and John B. Smith, a citizen
of Kentucky, to secure $4,000,000 of bonds,
$2,000,000 of which are now outstanding in the
hands of *bona fide* holders for value, who had not
received any notice of the existence of any claim to
a statutory lien on the road, except such as may be
implied from the Tennessee laws of 1851-2, and 91
their amendments, and the circulation as aforesaid
of the said opinion of Judges Davies and Davis ad-
dressed to J. J. Donaldson, as Chairman of the
Committee of bondholders. Said mortgage was
duly registered (p. 37).

With reference to the answer in the Memphis,
Clarksville and Louisville R. R. Co. The M. C.
& L. R. R. Co. having defaulted on its interest the
Governor placed it in the hands of a Receiver as
early as July 1st, 1865, and though it was continued 92
under State Receivers until it was sold "it never
paid one cent into the treasury on any account
whatever."

The easterly span of the Cumberland River
Bridge and the whole of the bridge over the Ten-
nessee River had been destroyed during the war,
some of the trestling had been swept away, some of it

had been thrown out of position, and all of it that was standing needed extensive repairs. One of the most frightful railway accidents of modern times occurred on this road in consequence of a passenger train running through the Budd's Creek trestle. The dirt embankments had been badly washed, and the cuts filled up with mud, in some instances ten feet deep. Many parts of the road were overgrown with grass, weeds and briars. The farmers along the road, being in need of iron during the war, had taken rods, bolts, spikes and chairs for blacksmithing purposes, and had even cut the bridges and trestles to get the iron. Switch circles, targets and connecting rods were taken off and used for the same purpose.

This railroad is about eighty-two miles long. The termini are both small villages of no commercial importance, and the country traversed is poor and sparsely settled. The road crosses three large rivers, and numerous small streams requiring many bridges and trustles. The cost of construction and maintenance of way is enormous, while the local business of the road is almost nothing. To have kept such a road in operation through a receiver until the State bonds loaned to it matured would have cost the State millions of dollars. To have allowed it to remain unused would have been equivalent to abandoning it to waste and destruction, and as to the company keeping it up, they were utterly insolvent, and as early as March 28, 1867, initial proceedings to go into voluntary bankruptcy, for which purpose they afterwards filed a petition in the United States District Court at Nashville.

It is agreed that the bill of the Memphis, Clarksville and Louisville Railroads against the Commissioners for the sale of delinquent railroads and the action thereon may be read.

After their purchase of the Memphis, Clarksville

and Louisville R. R. Co., the Louisville and Nash- 97
ville Railroad Company executed a mortgage upon said Memphis, Clarksville and Louisville Railroad Company, conveying it to Junius B. Alexander, a citizen of New York, and John B. Smith, a citizen of Kentucky, to secure $2,465,200 of bonds, which were endorsed by the Louisville and Nashville Railroad Company and negotiated in Europe in 1872, where they are now outstanding in the hands of purchasers for value. Said mortgage was executed August 1, 1872, and shortly thereafter was duly 98
registered in all the counties through which said road runs. The purchasers of said bonds had not received any notice of the existence of any claim to a statutory lien on the roads except such as may be implied from the Tennessee laws of 1851-2, and their amendments, and the circulation as aforesaid of the said opinions of Judges Davies and Davis, and addressed to J. J. Donaldson as Chairman of the Committee of Bondholders.

Afterwards, on November 1, 1873, the Louisville 99
and Nashville Railroad Company executed a mortgage on their main stem and branches, including said Memphis, Clarksville and Louisville Railroad to secure $4,000,000 of bonds, $2,000,000 of which are now outstanding in the hands of purchasers for value who have not received any notice of the existence of any claim to a statutory lien on the roads except such as may be implied from the Tennessee laws of 1851-2, and their amendments, and the circulation as aforesaid of the said opinion of Judges 100
Davies and Davis addressed to J. J. Donaldson as Chairman of the Committee of Bondholders. Said mortgage conveyed said property in trust to Henry F. Vail, a citizen of New York, and John B. Smith a citizen of Kentucky, and was, shortly after its execution, duly registered in all the counties through which said Memphis, Clarkville and Louis-

101 ville Railroad runs. Said road lies entirely within the State of Tennessee.

It is admitted that the complainant received several years ago from his father, who had been an owner of Tennessee bonds for many years, an amount between one and two hundred thousand dollars of said Tennessee bonds; he also became an owner of such bonds by individual purchases made on his own account about eight years ago. The aforesaid bonds cost his father and himself more
102 than eighty cents on the dollar; and that in addition thereto for some time prior to the filing of these bills, he was engaged in the New York market in selecting Tennessee State bonds loaned to the Central Southern and the other companies involved in these suits, and has been buying Tennessee bonds on the market at heavy rates of discount, at less than fifty per cent. of their par value; that he has been exchanging Tennessee bonds which had not been loaned to railroads for bonds issued to res-
103 pondents, paying one or two per cent. for the exchange.

That at the time he was making these transactions he knew that the defendant railroad companies claimed that they had paid their entire debts on account of Tennessee bonds, and denied all liability either to the State or to the bondholders for bonds, but complainant relied upon what he thought were the rights conferred upon holders of such bonds by the Internal Improvement Act of February 11, 1852,
104 and its amendments, and did not believe that it was in the power of the State and the railroad companies to discharge the lien which he believed was created by those acts except by actual payments to the holders.

Some of the bonds sued on in these suits were received from complainant's (Stevens) father; some were purchased about eight years ago by him, some

were recently acquired by him by purchase or ex- 105
change, as stated above. That James L. Gaines has been Comptroller of the State of Tennessee since January, 1875.

It is further stipulated that all statutes, public documents and records of the State of Tennessee may be read as evidence by either party on the hearing of the causes, subject to exception for irrelevancy. They may be so read, as may also the public statutes of New York, from the usual official publications, without any more formal proof, except 106
that either party may introduce certified copies of the original documents where any difference appears between the published volumes and such originals. Other facts not embraced in this stipulation and deemed material by either party may be subject of proof in the usual mode.

It is further agreed that all five of the above cases may be heard at the same time and place before the same Court.

E. L. ANDREWS, 107
Solicitor for Complainants.
ED. BAXTER,
Solicitor for Respondents.

August 14, 1879.

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Exhibit X 128

A CLASS OF BONDS

OF THE

State of Tennessee,

LIENS

UPON CERTAIN

RAILROADS IN THAT STATE.

LEGAL OPINION

BY

JUDGES DAVIES and DAVIS.

NEW YORK, May 2, 1870.

J. J. DONALDSON, ESQ.,

Chairman of Committee of Bondholders:

DEAR SIR.—We have examined the various acts of the Legislature of the State of Tennessee, relating to State bonds issued to several railroad companies of that State, and the remedies of the holders of such bonds to enforce their legal rights.

The question presented for our consideration is whether the bonds issued by the State of Tennessee to certain railroad companies, under the provisions of the Act of the Legislature of the State (passed February 11, 1852) and now held by purchasers thereof, are a continuing lien upon the roads and property of the companies to which they were respectively issued, in favor of the holders of such bonds, and of which lien, and of the right to enforce the same, the present holders cannot be deprived by subsequent legislation of the State. This question is of much practical importance as against the railroad companies that are now fully able to pay their obligations and discharge the liens. The bonds in question bear upon their face a declaration that they are issued under the Act of 1852. There is no difficulty in their identification as liens upon the road of the company that received them, for the Act provides that the officers of the company shall give a receipt for the bonds at the time of their issue, specifying them by their particular numbers.

"The numbers and character of the bonds are matters of public record, and all prudent men must have acted in these matters in reference to their existence" (Trustees of the Wabash and Erie Canal Company *v.* Beers, 2 Black, 453.)

The third section of the Act provides that the bonds issued to any company "*shall constitute a*

lien" upon the road and other property of the company; and that "*for the payment by said company of said bonds, with interest thereon as the same becomes due*," the State "shall be invested with said lien or mortgage without a deed from the company." It is the bond that is by law constituted the lien; it is the bond, and the interest that may accrue thereon, that the company became bound to pay, and it is for the performance of that obligation that the State is invested with a lien or mortgage on the property of the company. The bonds are thus made the principal thing, and the mortgage is their incident. The payment to be made by the company, and which is secured by the lien, is to be made to or for the benefit of the owners of the bonds. By its terms, as well as by its plain equitable construction, the Act of 1852 treats the bondholders as creditors, the State as trustees and surety, and the railroad companies as debtors. The contracts entered into under this law are in the nature of *tripartite* agreements. The companies assume, and give *full liens for the payment of the bonds and the interest thereon*. The language of the statute is plain and emphatic, and the act not only provides that the bonds, when issued to a company, "*shall constitute a lien*" for their payment upon the entire road, equipments, and all the property owned by the company, or incident to or necessary for its business, and "including the stock," but it also provides that, if the railroad company fail to pay the State bonds when they become due, the Court of Chancery may issue all necessary decrees "*to receive the payment of said bonds.*"

These provisions are not made merely to indemnify the State for payments it may have made, but to secure the payment of the principal and interest directly to the bondholder himself. They operate *ex proprio vigore* as his security for his debt, and it

is not necessary to invoke the principle of subrogation because the lien or mortgage is by the law made the security for the performance *by the company* of the thing to be done to the bondholder. They are analogous therefore, to the mortgages executed by corporations to trustees for the benefit of specified classes of bondholders. Section third of this Act, to quote more fully, declares that so soon as the *bonds* of the State shall have been issued for the first section of the road as aforesaid, *they shall constitute a lien* upon said section so prepared as aforesaid, including the road bed, right of way, grading, bridges and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered, and the *State of Tennessee*, upon the issuance of the said bonds, and by virtue of the same, *shall be invested with said lien or mortgage*, without a deed from the company, *for the payment by said company of said bonds, with the interest thereon as the same becomes due.*" The lien, according to this and other sections of the Act, is perfect, in favor of the bondholders, and the State is invested with a mortgage *only for the payment of the bonds.* The State could not remove or destroy this lien, to the prejudice of purchasers of the bonds if it has designed to do so. (2 Black, 456.) The State is a mere conduit through which the lien may be enforced in certain contingencies, and when the company is able to pay, the State has no interest in the litigation that may arise. The constitution and laws "look to things, not to names; to the actors in controversies and suits, not to mere forms or inactive instruments used in conducting them in virtue of some positive law."

McNutt *v.* Bland, 2 Howard, 10.

The law gives the State no security or promise, on

the part of the railroad company, to pay, except that which enures by subrogation to the benefit of the bondholders; and the fact that the State cannot be sued, or is a bankrupt State, is a good reason why a Court of Equity should give a bondholder relief by the requisite decrees *against the property pledged*. "It is not indispensably necessary to make all the parties in interest parties to a suit, if the Court can do justice to the parties before it, and without injury to absent parties equally interested." (Payne *v.* Hook, 7 Wallace 425). And it would seem not to be necessary to make the State a party in enforcing a lien against property, even when owned and pledged by a State.

Beers *v.* Trustees of Erie and Wabash Canal, 2 Black, 453).

The act also provides that the railroad companies "shall deposit in the State Bank at Nashville, at least fifteen days before the interest becomes due, an amount sufficient to pay such interest, including exchange and necessary commissions, *or give satisfactory evidence that the interest has been paid or provided for.*" This provision contemplates that the State Bank will act as the agent of the bondholders in receiving the interest money and paying it over to them. It in no manner acts as the agent of the State, for the bondholders must be regarded as agreeing to that provision for the payment of interest. (Ward *v.* Smith, 7 Wallace, 447. Ross *v.* Curtiss, 31 N. Y., 606.) If the bank goes out of existence, it is the absolute duty of the railroad companies to adopt the other alternative named in the act; and that is to give satisfactory evidence that the interest has been paid or provided for. At all events, nothing but a *payment into the bank* of the interest and principal of the bonds, *or the payment of the interest and principal of the*

bonds to the owners thereof, will release the lien or mortgage of the bonds upon the roads. The acts of the State of Tennessee of 1869 and 1870, requiring railroad companies to pay to the State Comptroller the money due by such companies to the above named bondholders, and appropriating this money for ordinary State purposes, are acts of confiscation or spoilation, so far as those acts apply to the bonds issued under the act of 1852, and now held by *bona fide* purchasers, and courts will give those acts no countenance, but will treat them and all payments under them as nullities. The original contract cannot be modified, or impaired, without the consent of the bondholders; and should the railroad companies pay to the State Comptroller, under the provisions of those acts, or to any other officer or person than the bondholders or their agent, they will pay at their peril, and upon them will rest the responsibility of taking care that the money is paid over to the rightful creditors.

In the event of the appointment of a receiver by the Governor, as provided for by the act of 1852, it is declared that the Receiver shall receive the rents, issues and profits, and dividends, and pay over the same under the direction of the governor, "towards the liquidation of the *unpaid interest*" *on the bonds issued to the roads;* and that, when the interest on the bonds has been discharged and paid off, the road shall be surrendered by the receiver to the company. The sinking fund clause, in the seventh section of the act, is also framed to guard the rights of the bondholders, and only permits the *particular* bonds issued to a road to be *cancelled* when they are paid into the sinking fund by any railway company. Other bonds paid into the sinking fund are a mere "*credit as between the State and the said company,*" and will remain in full force until paid by the company to which they were originally is-

sued. The whole tenor of the act indicates that the lien is for the benefit and protection of the bondholders, and any attempt to impair the lien must invalidate a solemn pledge or contract of mortgage.

It is true that the law of 1852 is a part of the contract, and binds the parties, but it is well settled that when "a law is in the nature of a contract, when absolute rights have invested, the repeal of the law cannot divest those rights." (Fletcher *v.* Peck, 6 Cranch, 87). The twelfth section of the act, when rightly construed, does not reserve to the State the power to divest rights of bondholders, but reserves the power, if necessary, by additional legislation, to enforce these rights. It is in these words: "The State of Tennessee expressly reserves the right to enact by the Legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State against any loss in consequence of the issuance of bonds under the provisions of this act, but in such manner as not to impair the vested rights of the stockholders of the companies."

It must be presumed that the State intended to be honest, and had no intention to invalidate the vested rights of the purchasers of its bonds, and that a reservation of a power to legislate so as "to protect interest of the State" against any loss in consequence of the issuance of its bonds, was not designed to provide for either the total or partial repudiation of the bonds themselves. On the contrary, it looks to only such additional enactments as will save all loss to the State, by compelling companies which have received bonds to pay them to their rightful owners. This section, therefore, gives no authority to legislate against the bondholders, but in their favor, not to impair or destroy their security, but to create additional facilities for enforcing it; and the provision that the Legislature shall not "impair

the vested rights of the stockholders," whose stock *is mortgaged to the bondholders*, indicates that this section was intended to give the bondholders additional security. There is an obligation, both on the part of the State and the railroad companies, to pay these bonds, which are secured *by a lien on the roads*, and the State can neither impair its own obligation nor the obligation of the companies. The rights of the creditors and the demands of justice require that the rights reserved under the 12th section of the law should be exercised in favor of affirmative action for the relief of the bondholders. A law which imposes a duty to receive money to pay a debt, or to pay it, cannot be interpreted to authorize the invalidating or confiscating of the debt. What public officers are empowered to do for a third person the law requires shall be done. (Supervisors *v.* United States, 4 Wallace, 435; City of Galena *v.* Amy. 5 Wallace, 705.) The Courts cannot act directly upon Legislatures but they can declare null and void all of their unconstitutional acts; and the Courts can act directly upon State officers, the Comptroller and Governor of the State; and a State officer may be enjoined from enforcing a State law which impairs a contract. (Osborn *v.* U. S. Bank, 9 Wheaton, 738.) "It is true the State cannot be sued, but when the State appoints an agent or trustee to pay a particular debt or class of debts with a particular fund, it has never yet, and never can be, held that a party interested in the fund may not intervene by injunction to prevent such agent from appropriating the fund to an entirely different purpose." (Trustees Int. Imp. Fund *v.* Bailey, 10 Florida, 112.)

There is no promise or obligation on the part of the companies under this act to pay the State, unless the State become the owner of the bonds, after their issuance. The obligation is to pay the bonds, which means, of course, to pay to the holder of the bonds,

and "the comptroller is authorized, and it is made his duty, upon his warrant, to draw from the treasury any sum of money necessary to meet the interest on such bonds as may *not be provided by the company, as provided for in this act.*" *This section of the act is incapable of repeal*, and a *mandamus* will compel the Governor to appoint a receiver as the act requires, and will compel the comptroller to pay over to the bondholders moneys received from a company, and to draw his warrant on the treasury for any deficiency *not provided for by the company.* (McCauley *v.* Brooks, 16 Cal., 11, Opinion by Chief Justice Field, now Associate Justice in U. S. Supreme Court.)

The fact that the Legislature has the power to alter and amend charters, or repeal or enact new laws, gives no power to invalidate contracts or impair obligations which were valid and lawful when they were made. (Woodruff *v.* Trapnall, 10 Howard, 190; Von Hoffman *v.* City of Quincy, 4 Wallace, 535; Havermeyer *v.* Iowa County, 3 Wallace, 294; Hawthorne *v.* Calef, 2 Wallace, 10; Gelpecke *v.* The City of Dubuque, 1 Wallace, 175; Jefferson Branch Bank *v.* Skelly, 1 Black, 436; Curran *v.* State of Arkansas, 15 Howard, 304; Planters' Bank of Mississippi *v.* Sharp, 6 Howard, 301; Steamship Company *v.* Joliffe, 2 Wallace, 450; McGee *v.* Mathis, 4 Wallace, 143; Furman *v.* Nichol, 8 Wallace, 44, in which the substantial question was the power of the Legislature to repudiate the bills of the State Bank of Tennessee.)

A doctrine adverse to these decisions, if adopted by courts, would be most disastrous to private rights. The charters of most corporations in the several States are subject to alteration and amendment by State Legislatures, and if the power to alter and amend charters and laws carries with it the right to impair vested rights, or overturn con-

tracts made by corporations before the alteration, the investments of millions of money would be subject to repudiation or to the caprice of State Legislatures.

If the construction that the twelfth section gives the right to the State to release the lien of the bondholder or impair his security, be the true one, then we think that the section would be clearly unconstitutional. All laws in existence in a State when a contract is made, may, in a certain sense, be considered a part of it; but a statute giving a subsequent Legislature the power to change, impair or modify a contract *inter partes*, which is valid when made, is not *law*, and therefore does not enter into the contract. This question is decided in the case of Goenen *v.* Schroeder, 8 Minn., 307. Nor can an act passed for the purpose of confiscating or appropriating private property, or the working of that wrong by its own operation, be held to be "according to due process of law." (Taylor *v.* Porter, 4 Hill, 140; Brush *v.* Newberry, N. Y. Court of Appeals, 10 Selden, 374.) Constitutional prohibitions against States impairing contracts or taking property without due process of law, cannot be evaded by a reservation of the power on the part of a Legislature to commit these wrongs. If we adopt the principle that a State may enact laws that all subsequent contracts shall be subject to be impaired by subsequent Legislative action, the constitutional prohibition against impairing contracts will be nugatory. (Story on the Constitution, Vol. II, page 275; Judge Marshall in Ogden *v.* Saunder, 12 Wheaton, 213.) Statutes are not be construed to have a retrospective effect unless such construction be required in the most explicit terms, the presumption being that they are to operate prospectively, and not to impair vested rights. (Plumb *v.* Sawyer, 21 Conn., 351); and if the Legislature of Tennessee has, under this

twelfth section of the act, any power over the rights and securities of bondholders, it must be in reference only to bonds issued after the legislature has taken action. In the case of Sherman *v.* Smith, 21 N. Y., 9, and the same case, 1 Black, 587, it seems to be settled and conceded that a *prior* engagement cannot be enlarged or modified by subsequent legislative action, and that banking associations cannot prevent the repeal of laws as to *future contracts* by embodying those laws into their articles of association. Hence we arrive at the reasonable conclusion that individuals and corporations cannot assume legislative powers by inserting laws in their contracts, and that the legislature of a State cannot invade the *domain of private vested rights* by impairing contracts made agreeably to existing laws. We are therefore of opinion that nothing except the full payment and satisfaction of the *identical* bonds issued by the State of Tennessee to a railroad company, under the act of 1852, and before its repeal or modification, will release the pledge, lien or mortgage on the road; and that the holders of these bonds now have the same equities and are entitled to the same remedies and decrees that were granted by the Court in the case of Beers *v.* Wabash and Erie Canal Company, 2 Black, 453.

Yours, respectfully,

HENRY E. DAVIES,
NOAH DAVIS,
149 Broadway.

1300

IN THE

Supreme Court of the United States.

CALVIN AMORY STEVENS *et al*,

vs.

MEMPHIS & CHARLESTON RAILROAD COMPANY.

No. 347.

It is hereby stipulated that the record in this case upon which the case is to be argued before the Supreme Court of the United States, shall be amended by adding thereto the documents, copies whereof are hereto annexed, which have been omitted by mistake in the record, as heretofore made up and printed; and that upon filing this stipulation, the clerk shall amend the record on file and the printed copies, by making such additions thereto, with like effect, as if the matters so added had been originally included in the return made from the Circuit Court—this stipulation being made to avoid the necessity of correcting the record by means of *certiorari*.

WM. M. BAXTER,

Solicitor for Respondents.

E. L. ANDREWS,

Solicitor for Complainants.

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